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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 CITIZENS for RESPONSIBILITY  
4 and ETHICS in WASHINGTON,  
5 RESTAURANT OPPORTUNITIES  
CENTERS (ROC) UNITED, INC.,  
JILL PHANEUF, ERIC GOODE

6 Plaintiffs

7 v.

17 Civ. 00458 (GBD)  
Motion

8 DONALD J. TRUMP, in his  
9 official capacity as President  
of the United States

10 Plaintiff

11 -----x  
12 New York, N.Y.  
13 October 18, 2017  
10:30 a.m.

14 Before:

15 HON. GEORGE B. DANIELS

District Court Judge

16 APPEARANCES

17 COHEN MILLSTEIN SELLERS & TOLL PLLC  
18 Attorneys for Plaintiff  
JOSEPH SELLERS

19 GUPTA WESSLER PLLC  
20 Attorneys for Plaintiffs

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24 UNITED STATES DEPARTMENT OF JUSTICE  
Attorneys for Defendant Donald J. Trump  
25 BRETT A. SHUMATE  
JEAN LIN

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(In open court; case called)

THE DEPUTY CLERK: Would the parties please rise and state your appearances starting with the government.

MR. SHUMATE: Good morning, your Honor. Brett Shumate from the Department of Justice on behalf of the President.

THE COURT: Good morning, Mr. Shumate.

MS. LIN: Good morning, your Honor. Jean Lin from the Department of Justice on behalf of the President.

THE COURT: Good morning, Ms. Lin.

MR. GUPTA: Good morning, your Honor. Deepak Gupta for the plaintiffs. Sitting with me at counsel able are my colleagues Jonathan Taylor, Joshua Matz, Zephyr Teachout, Norm Eisen and Noah Bookbinder.

MR. SELLERS: Your Honor, good morning. Joseph Sellers also for the plaintiffs.

THE COURT: Good morning.

Let me start with the government. I will hear you, Mr. Shumate, with regard to your motion to dismiss.

MR. SHUMATE: Yes, your Honor. May I use the podium?

THE COURT: Yes, please use the podium.

MR. SHUMATE: May it please the Court, the Court should dismiss this case challenging the President's compliance with the Constitution Emoluments Clauses for three reasons:

First, these plaintiffs lack standing because their supposed injuries are nothing more than abstract disagreements

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1 with the President and speculative fears about increased  
2 competition.

3 Second, the Court lacks jurisdiction to issue an  
4 injunction against a sitting President of the United States.

5 Third, these plaintiffs have not sufficiently alleged  
6 that a federal office holder violates the Emoluments Clauses by  
7 owning an interest in a company that does business with a  
8 foreign government.

9 Your Honor, the first question, as always, is whether  
10 any of the plaintiffs before the Court have standing. As we've  
11 explained in the briefs, none of these plaintiffs have standing  
12 because their alleged injuries are too abstract and are too  
13 speculative. If the Court were to find that any of these  
14 plaintiffs have standing, it is hard to imagine any plaintiff  
15 in the United States that would not have standing.

16 I'd like to walk the Court through our view of why  
17 these plaintiffs lack standing, starting with CREW and ending  
18 with the other three plaintiffs which we call the Hospitality  
19 plaintiffs.

20 First, starting with CREW, your Honor, they claim that  
21 they are concerned about the President's compliance with the  
22 Emoluments Clauses, that they are spending money to investigate  
23 that issue, and that they are diverting resources to bring this  
24 lawsuit. That is not a cognizable Article III harm for a  
25 couple of reasons.

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1 First, it is an abstract harm. It is a generalized  
2 grievance shared in common with the entire public. And the  
3 case I would point the Court to is the *Schlesinger* case from  
4 1974, a Supreme Court case, in which an organization dedicated  
5 to ending the war in Viet Nam brought suit alleging that  
6 members of Congress were violating the Constitution because  
7 they held memberships in the Armed Forces Reserve at the same  
8 time they were members of Congress. What these plaintiffs were  
9 concerned about is that these members of Congress were not  
10 faithfully discharging the duties of their office, and that  
11 they might be subject to undue influence by the Executive  
12 Branch. The Supreme Court said that this is an abstract harm.  
13 It is a generalized grievance shared in common with the entire  
14 public.

15 That's exactly what we have in this case with CREW:  
16 CREW is concerned about the President's compliance with the  
17 Emoluments Clause. And if you look at paragraph 154 of the  
18 Complaint, that's where CREW describes their alleged injuries.  
19 What they say is that they are concerned about the risk of  
20 foreign governments using money to improperly influence the  
21 President. They are concerned about the President's motives in  
22 making decisions and conflicts in violations that the public  
23 will have insufficient information to judge. That is an  
24 allegation that any member of the public could bring against  
25 the President and it cannot be sufficient to confer Article III

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standing.

Now, CREW tries to get around this by claiming that they are spending money, and they are investigating the President's conduct, and they are diverting resources to focus on this particular issue; but that also is not enough because those are all voluntary decisions and self-inflicted harms.

The Supreme Court was quite clear in a case called *Clapper* in 2013 that a plaintiff cannot manufacture harm for Article III standing by inflicting harm on itself in the absence of a certainly impending injury.

That's exactly what we've got here. CREW is spending money. They are diverting resources to investigate the President's conduct. But those are all voluntary choices that this organization has made. To the extent they are suffering any injury at all, it is self-conflicted harm and that does not suffice under Article III standing principles. If we just walk through a couple allegations in the Complaint, we can see that these are all allegations that any member of the public could bring to allege Article III injury. Look at paragraph 155 of the Complaint. CREW alleges they are gathering information about the Emoluments Clause violations in responding to media inquiries. Paragraph 156: Issuing press releases and statements. Paragraph 157: Doing legal research about the Emoluments clauses. And paragraph 159: Researching legal claims against the President and drafting the Complaint in this

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1 lawsuit. These are all decisions that CREW has made to bring  
2 this lawsuit, and that is not a sufficient harm for purposes of  
3 Article III because any member of the public could do exactly  
4 what CREW is doing and manufacture Article III harm.

5 Now, CREW also tries to get around this by relying on  
6 a case called *Havens*. *Havens* standing is not available here  
7 because CREW puts the cart before the horse. Under *Havens*, a  
8 distinct injury must precede the diversion of resources. In  
9 *Havens*, what happened was there were racial steering practices  
10 at issue. What the Court said in that case is that the racial  
11 steering practices was causing a distinct harm to the  
12 organization. As a consequence of that distinct harm, the  
13 organization was diverting resources to counteract that harm,  
14 to avert the harm to the organization.

15 CREW has it exactly backwards because they claim that  
16 the diversion of resources itself is a distinct injury, but it  
17 is not. CREW is not taking that action to avert some harm to  
18 itself, to counteract some harm to the organization. They do  
19 not have members. They do not have clients, as the  
20 organization in *Havens* did. CREW is doing this on behalf of  
21 the entire public; and if CREW can do it, then any member of  
22 the public can do it. This case is just like *The Sierra Club*  
23 case in 1972 in which the Supreme Court said just a mere  
24 abstract interest in a problem is not enough to confer Article  
25 III standing. So, therefore, in our view, your Honor, CREW

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1 does not have standing and should be dismissed.

2 Now, there are three other plaintiffs in the case,  
3 your Honor. We call them the Hospitality plaintiffs. What  
4 their allegations are, are that they are competing with the  
5 President's businesses. Their theory is that foreign  
6 governments are going to the Trump properties rather than their  
7 own, and that this is causing them some harm. They relied  
8 exclusively on the competitor standing doctrine, but this case  
9 would be a radical expansion of that doctrine far beyond  
10 anything the Second Circuit has ever recognized; and if these  
11 businesses who claim that they compete with the President's  
12 businesses have standing, it's hard to think of any business in  
13 Washington D.C. or New York City that would not have standing  
14 simply based on an allegation that they compete for the same  
15 pool of customers as the President's businesses. Here, again,  
16 all the plaintiffs allege is that they compete with the  
17 President's business, but that is not enough to confer Article  
18 III standing on an competitive standing doctrine theory because  
19 they can't show an increase in competition. This is not a case  
20 where the Court can infer a certainly impending Article III  
21 injury in the form of lost business really for two fundamental  
22 reasons:

23 First, is that the government is not taking any  
24 regulatory action in this case, that is skewing the competitive  
25 playing field. The classic use of the competitor standing

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1 doctrine is a situation in which the government controls the  
2 market, and it is taking some regulatory action to skew the  
3 competitive playing field. For example, allowing a new market  
4 entrant or granting a tax subsidiary or granting a direct  
5 benefit to one competitor over another. But that is not  
6 happening in this case.

7 The President is not controlling access to the market.  
8 The President is a market participant, and it's not the type of  
9 case where the Court could easily infer an increase in  
10 competition or an imminent loss of business to any of these  
11 plaintiffs. Again, the President is competing in the market.  
12 He is not controlling access to the market. And this would  
13 be --

14 THE COURT: Why is that necessarily not consistent?  
15 One can be in the market and still control the market.

16 MR. SHUMATE: I don't think there is any allegation  
17 that the President is controlling the market, your Honor. In  
18 fact, it would be quite difficult for him to control the  
19 market. That is the other point I would make, is that the  
20 markets here are quite different than any other case that we  
21 have found in which competitor standing has been recognized.

22 These are highly excessive markets. There are  
23 thousands of restaurants in New York City, hundreds of hotels  
24 in Washington D.C. and New York City. And individuals make  
25 decisions about where to stay and where to eat for any number



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1 of different reasons. It can be the location, the quality of  
2 the food, the quality of the hotel, the brand name. This is  
3 just not a case where you can easily infer that just because  
4 the President owns an interest in a business, that that is  
5 causing an imminent harm to any of these other competitors.  
6 Again, all they allege is that they compete in the same market,  
7 but these are highly diffuse markets with lots of different  
8 competitors. It's not the type of case where you've got two  
9 directly competing entities and the government is taking some  
10 direct action to allow a new market entrant or grant a  
11 subsidiary to one business over another.

12 THE COURT: Isn't the allegation a little bit more  
13 than they just compete in the same market. There are some  
14 specific allegations that they have lost business, business  
15 that they previously had; that that business has been lost to  
16 Trump entities. That is more than just being a competitor in  
17 business.

18 MR. SHUMATE: No, I don't think so, your Honor. I  
19 think they have not attempted to show an actual injury. They  
20 have exclusively relied on the competitor standing doctrine  
21 which necessarily requires the Court to make an inference, an  
22 inference of a certainly impending loss of business. And  
23 because of the nature of the market and the involvement of the  
24 government in the market, it's just not an easy case in which  
25 the Court can make that inference.

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1           So let's take one of the plaintiffs, for example, Jill  
2 Phaneuf. She is an individual who lives in Washington D.C. and  
3 works for a company that books events at other hotels in  
4 Washington D.C. She does not own a property that competes with  
5 one of the President's businesses. She does not work for one  
6 of the properties that competes with the President's  
7 businesses. She works for a third-party company that seeks to  
8 book events at one of the properties in DuPont Circle. But she  
9 is asking the Court to make an inference that she is imminently  
10 going to lose commissions based on the mere fact that the  
11 President is involved in the market. That is quite a  
12 speculative leap. She is not alleging that she has actually  
13 lost commissions or she has actually lost business. In fact,  
14 she alleges that she has not booked an event for an embassy  
15 event at one of these properties, only that she desires to do  
16 so. So what she is asking the Court to infer is a certainly  
17 impending injury even though she does not own a business that  
18 competes with the President and she does not work for a  
19 business that competes with the President. She merely works  
20 for a booking company that seeks to compete in that same  
21 market. So, if Ms. Phaneuf has standing based on those  
22 allegations, it's hard to see how any individual who works in  
23 the hospitality industry in Washington and New York City would  
24 not have standing by making the same allegations.

25           Your Honor, even if you find that any of these

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1 plaintiffs have standing, the Court should still dismiss the  
2 case for lack of jurisdiction for a second reason. That is  
3 because the Court lacks jurisdiction to issue an injunction  
4 against a sitting President of the United States. The Supreme  
5 Court held long ago in a case called *Mississippi v. Johnson*  
6 that a court lacks jurisdiction to enjoin the President in the  
7 performance of his official duties. That principle is still  
8 good law. The Supreme Court reaffirmed that in a case called  
9 *Franklin v. Massachusetts* in 1992. The Court said in that  
10 case, again, issuing an injunction against the President raises  
11 significant concerns under the separation of powers and the  
12 Court's involvement in Executive Branch functions. What  
13 Justice Scalia explained in his concurring opinion is that a  
14 court should hesitate before doing that because no court that  
15 we have found has actually issued a injunction against the  
16 President in a case where he is the only defendant, as he is in  
17 this case.

18 To be clear, this is not some ministerial action that  
19 the plaintiffs are asking the Court to could to enjoin the  
20 President. They are asking the Court to order the President to  
21 divest all of his businesses and for the Court to be in this  
22 court for many years supervising the President's businesses and  
23 reviewing the exercise of his judgment and discretion about how  
24 to divest those businesses. That endeavor is fraught with  
25 separation of powers concern for a court to be supervising be

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1 the President's businesses, and is it is not something this  
2 Court should take lightly.

3 THE COURT: Why isn't that a question of remedy at  
4 this point? Injunctive relief is not the only remedy in a  
5 lawsuit. There's also declaratory relief. Those cases that  
6 deal with injunctions against the President don't control  
7 whether or not the Court should make a finding one way or the  
8 other but whether or not the President is violating the  
9 Emoluments Clause.

10 MR. SHUMATE: I respectfully disagree, your Honor.  
11 *Franklin v. Massachusetts* explains that declaratory relief  
12 raises same separation of powers concern as injunctive relief.

13 THE COURT: Not for the same rationale that you just  
14 gave. I don't have to monitor the President's conduct.  
15 Whether it is appropriate for this Court to take some action to  
16 prevent the President from being engaged in this activity is a  
17 different question. That could be Congress's role. That could  
18 be the Court's role. It may not be the Court's role. The  
19 President may voluntarily decide that he would comply. Why is  
20 that necessarily an issue that is one of whether or not this  
21 case should be initially brought as opposed to what would be  
22 the result of this case if in fact it were determined that the  
23 President was violating the Emoluments Clause.

24 MR. SHUMATE: Your Honor, you could look at this  
25 question in one of two ways: You could look at it as a

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1 question of remedy or you could look at it as a question of  
2 redressability, which is an aspect of standing. If we are  
3 correct that the Court lacks jurisdiction to issue a junction  
4 or declaratory relief against the President, then the  
5 plaintiffs lack standing because the Court cannot remedy any of  
6 the supposed injuries that these plaintiffs have.

7 To your Honor's question about could the Court issue  
8 declaratory relief and not order the President to do anything,  
9 that sounds an awful lot like an advisory opinion that does not  
10 require the President to take any action. It is just a  
11 decision basically in the abstract. What the Supreme Court  
12 said in Franklin, or perhaps it was Justice Scalia in his  
13 concurring opinion, that that is still fraught with separation  
14 of powers concern because it pits two branches of government  
15 against themselves. Merely to issue declaratory relief raises  
16 the same concerns about injunctive relief.

17 Your Honor, even if the Court finds the plaintiffs  
18 have standing and it has jurisdiction, the Court should still  
19 dismiss the case because the plaintiffs have not sufficiently  
20 alleged that the President is in violation of the Emoluments  
21 Clause simply because he has an interest in a company that does  
22 business with foreign governments.

23 Now, the threshold question for the Court is what is  
24 the meaning of the word "emoluments." There are two  
25 interpretations before the Court. On the one hand, emolument

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1 could mean profit arising from office or employ, as we argue.  
2 Or it could mean, as the plaintiffs argue, anything of value.  
3 Now, I'd like to first explain our interpretation of the word  
4 emolument and why it's rooted in the original public meaning of  
5 the word, a context in which the word appears in the  
6 Constitution, the historical understanding of that term. And I  
7 would also like to explain why it is a workable and common  
8 sense interpretation. Then I would like to explain why the  
9 plaintiff's interpretation, anything of value, is not a  
10 reasonable construction of the word emolument. But before I  
11 do, your Honor, I would like to just take a moment and identify  
12 the three uses of the word "emolument" in the Constitution.

13 First, there is the Foreign Emoluments Clause. I'll  
14 paraphrase here, but I'll do so accurately. It applies to a  
15 holder of any office of profit or trust, and it says that  
16 individual cannot accept any presents, emoluments, office or  
17 title of any kind whatever from any foreign government without  
18 Congress's consent.

19 Second, there's the Domestic Emoluments Clause, often  
20 also referred to as the Presidential compensation clause, and  
21 applies only to the President. It says that the President  
22 shall receive compensation for his services which can't be  
23 increased or decreased, and he cannot receive any other  
24 emolument from the United States, or any of them.

25 The third use of the word emolument is in what's

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1 called the Incompatibility Clause which applies to only members  
2 of Congress. It says: No senator or representative can be  
3 appointed to any civil office if the emoluments have been  
4 increased during his or her time in Congress.

5 So, three uses of the word emolument.

6 What is our interpretation of that word? What does  
7 emolument mean? Well, in our view, it means profit arising  
8 from office or employ. Profit arising from office or employ.  
9 In the context of the Constitution what that means specifically  
10 is a benefit conferred in exchange for some personal service in  
11 an official or employment-like capacity. A benefit conferred  
12 in exchange for personal service in an official or  
13 employment-like capacity. That is the best reading of the word  
14 emolument for four reasons.

15 THE COURT: Why is it that complicated? If we start  
16 with the Domestic Emoluments Clause, it's clear that what it is  
17 addressing is the President's compensation. Why doesn't  
18 emolument mean compensation? Why isn't that the most direct,  
19 most accurate definition in its use in all three of these  
20 clauses? It's clear that in the Domestic Emoluments Clause  
21 they're addressing the salary compensation that the President  
22 should be able to obtain. That doesn't seem to be a  
23 complicated concept. It says that the President shall receive  
24 compensation for being President during his term which can't be  
25 reduced or increased during that term, and that he should

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1 receive no other compensation from the federal government or  
2 any other state government.

3 Why do we need a more complicated definition of  
4 emoluments than that? It clearly means compensation. And in  
5 the context of the Domestic Emoluments Clause, it means the  
6 President's salary or any other compensation that he is  
7 provided for being President. Why is it more complicated than  
8 that?

9 MR. SHUMATE: Well, your Honor, compensation is  
10 certainly one type of emolument, but it is not the only type.  
11 At the time of the founding, there were many other types of  
12 emoluments that an officeholder might receive. It could be  
13 salary. It could be horses. It could be fines, forfeitures,  
14 penalties, any number of things. And so if you look at the  
15 Domestic Clause itself, it says, as you said, the President  
16 shall receive compensation for his services but not any other  
17 emolument.

18 If it only meant compensation, the founders presumably  
19 would have just said "no other compensation." But emolument  
20 can mean other things beyond compensation. And if you look at  
21 the Domestic Emoluments Clause, it says "of any kind whatever."  
22 What that clause means is that there are no exceptions to the  
23 types of emoluments that are excluded from the Foreign  
24 Emoluments Clause. So, again, emolument has a broader meaning  
25 than just compensation. It can be any benefit. But in our



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1 view it has a specific context in which the benefit must be  
2 conferred, must be conferred in exchange for some personal  
3 service in an official or employment-like capacity.

4 THE COURT: When you say, "it must be conferred in  
5 exchange," it's unclear from the position that you take in the  
6 brief. Are you saying that that emolument must be paid with  
7 that intent or are you saying that it can't be an emolument  
8 unless it is paying the President for something he has actually  
9 done?

10 MR. SHUMATE: The latter, your Honor. The  
11 officeholder needs to be doing some personal service in his  
12 capacity as the officeholder or in an employment-like capacity.

13 THE COURT: Well, suppose the President doesn't follow  
14 through. Suppose a foreign nation says, "We'd like you to sign  
15 this treaty that's favorable to this nation. We will give you  
16 a million dollars if you sign the treaty." Can he accept a  
17 million dollars?

18 MR. SHUMATE: No, because that would be a present,  
19 your Honor.

20 THE COURT: You're saying that's not an emolument.

21 MR. SHUMATE: It would not be an emolument. That  
22 would be a gift given without consideration.

23 THE COURT: Clearly, from the foreign country's  
24 perspective, that is not giving without consideration. They  
25 are not giving him a gift. And obviously if he says, "No, I

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1 will never do that," then it's not considered a gift to the  
2 President. It's difficult for me to understand that what the  
3 drafters of the Constitution meant is that it must be an  
4 executed bribe before it can become an emolument.

5 MR. SHUMATE: Our position is that there needs to be  
6 an exchange of some kind for it to be an emolument.

7 THE COURT: It can't just be a promise of some kind?

8 MR. SHUMATE: I think it would -- I would need to know  
9 the facts of the hypothetical, your Honor.

10 THE COURT: Well, there are only two sets of facts  
11 that I'm thinking about: One, the President would promise to  
12 do something in exchange for the money, or they would promise  
13 to give the President this money if he did what they asked him  
14 to do. So the question would be, on the day that they're  
15 proffering the money -- if they're proffering the money on  
16 Monday and the act that they want him to do doesn't happen  
17 until Friday, you're saying giving him the money on Monday is  
18 not an emolument?

19 MR. SHUMATE: I think if we look at the entire context  
20 in which the these --

21 THE COURT: That is the entire content.

22 MR. SHUMATE: If there is no personal service engaged  
23 in by the office holder, that would not be an emolument. There  
24 is no exchange involved. But if the office holder does carry  
25 through and take some personal service in an official capacity

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1 or an employment-like capacity, in our view that would be an  
2 emolument.

3 THE COURT: That's why it's hard for me to understand  
4 that concept and where you get that concept from. If they say  
5 that we will give you a million dollars in January for you to  
6 do an act in September, you're saying that the President can  
7 take that million dollars in January because it's not an  
8 emolument?

9 MR. SHUMATE: Well, your Honor, in that situation it  
10 looks a lot like a present but that is far afield from any of  
11 the allegations --

12 THE COURT: It's not a present. They are not giving  
13 him this as a gift. They are giving this because they expect  
14 something in exchange, and that is clearly what the founding  
15 fathers intended to prevent. They didn't intend to punish the  
16 President for his taking bribes. They intended to have a  
17 prophylactic rule that would take away the potential conflict  
18 by the President taking titles and gifts and emoluments,  
19 payments from others.

20 I understand your argument that an emolument is not a  
21 gift. An emolument is some sort of payment for some act to be  
22 accomplished, but I don't understand your argument that unless  
23 and until the President does the act that they're paying him  
24 for, that he can take the money because it doesn't constitute  
25 an emolument.

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1 MR. SHUMATE: Well, he couldn't take the money because  
2 it would be a present, your Honor. But to your larger point,  
3 the subjective intentions of the giver cannot matter. This is  
4 a bright-line test.

5 THE COURT: Well, what do you consider to be a  
6 present? You're keep saying it's a gift. If I say to you, if  
7 you come and work at the justice department, I will pay you,  
8 and I give you your first paycheck, and then you decide  
9 tomorrow, you change your mind and you want to work someplace  
10 else. Why is that a gift?

11 MR. SHUMATE: It's not a gift; that would be an  
12 emolument because the payment that you confer on me is an  
13 exchange for my services.

14 THE COURT: But you didn't start work yet, and you  
15 never did, and you changed your mind and you never worked  
16 there. That's what I'm saying, I don't understand the argument  
17 that somehow the President has to follow through; that what  
18 makes it an emolument is not the intent of the payment but  
19 whether or not the President satisfied the expectations of the  
20 giver of the emolument. I don't see anywhere where it is  
21 intended that a payment in exchange for a promised act does not  
22 constitute an emolument even under your definition.

23 If I say I'm going to give you something if you  
24 promise to do something for me. If I'm a foreign government,  
25 and I say I will give the President a million dollars if the

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1 President will promise that he will sign this favorable treaty  
2 to us, your argument is, if he signs the treaty, later on it  
3 becomes an emolument. If he doesn't sign the treaty, then it's  
4 just a gift. I don't understand why that defines whether or  
5 not it's an emolument. Emolument should be the payment with  
6 the expectation that you're giving that payment in exchange for  
7 what you expect back, and whether or not that person breaches  
8 that agreement shouldn't define whether it's an emolument,  
9 should it?

10 MR. SHUMATE: Well, your Honor, I think it's helpful  
11 to go back to the original public meaning of the word  
12 emolument. Barclays defines emolument as profit arising from  
13 office or employ. Inherent in that definition is the concept  
14 of an exchange of some kind. Profit for one's labor.

15 THE COURT: I'm not sure I agree with that. What's  
16 inherent in there is an exchange of promises just like any  
17 other contract. That's not consistent with basic contract law.  
18 You can't say it's not a contract because one side didn't  
19 perform. It's still a contract.

20 So, if the President promises to do something, and  
21 they say, "If you do this, we will give you the money," hasn't  
22 he breached that contract if he doesn't do it, and isn't that  
23 money paid in exchange for the promise that he will follow  
24 through with the act that he promised to do? I don't  
25 understand why that's not an emolument.

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1 MR. SHUMATE: I think what's missing in that  
2 hypothetical, your Honor, is some personal service provided in  
3 a official or employment-like capacity.

4 THE COURT: Provided rather than promised?

5 MR. SHUMATE: Correct.

6 THE COURT: So you say if the President says, "I  
7 promise to sign the treaty," that that's not an emolument.

8 MR. SHUMATE: Well, it would still be prohibited by  
9 the clause.

10 THE COURT: I know, but I'm putting aside the gift  
11 part of it because I am not even sure how that would fall into  
12 your definition of gift. As I say, if you say you're going to  
13 sell me your car for \$10,000. I give you the \$10,000 today,  
14 you say, "Show up tomorrow, I'll have the car." I show up  
15 tomorrow, and you don't have the car. How is what I gave you a  
16 gift?

17 MR. SHUMATE: It's certainly a situation -- still, if  
18 you keep the money, it is a gift given without consideration.  
19 There is no consideration exchanged in that circumstance.

20 THE COURT: Well, if you keep the money, how is that a  
21 gift? I'll go into court and sue you to get it back. I didn't  
22 gift it to you. As they say, everything that's logical is not  
23 reasonable. I understand the logic of what you're saying, but  
24 I don't understand the reasonableness of what you're saying  
25 that if I give you something in exchange for you agreeing to

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1 commit an official act, why that is not an emolument; that you  
2 want to say that that's a gift if I decide that I'm not going  
3 to do it, or if I decide -- let me give you another example and  
4 see how far the limits are of what you say this argument is.

5 If a foreign government says to the President, "I will  
6 give you a million dollars to sign this favorable treaty," and  
7 the President says to his staff person, "You know what? I  
8 intend to sign that treaty anyway. Let's just take the money."  
9 Is that an emolument?

10 MR. SHUMATE: I would think it would be a gift, your  
11 Honor.

12 THE COURT: Which one of the parties believes that to  
13 be a gift?

14 MR. SHUMATE: Belief does not matter, your Honor.

15 THE COURT: Why do you believe that to be a gift?

16 MR. SHUMATE: Because it is something that is received  
17 without compensation. So either way --

18 THE COURT: Because I said, "Well, I only gave it to  
19 you because you said you were going to do something. If you  
20 didn't do it, I want it back." And the President says, "I'm  
21 not going to give it back." Does that still make it a gift?

22 MR. SHUMATE: It would follow it would either be a  
23 present or an emolument, your Honor.

24 THE COURT: It's not a present if I gave it to you --  
25 as I said, if I said, "Sell me your car." It's not a present

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1 if I give you \$10,000 and you don't deliver the car, it's not a  
2 gift. There is no definition in logic or in law that defines  
3 that as a gift.

4 Now, if I said to you, "Oh, don't worry about it, I  
5 wanted to give you \$10,000 as a present anyway. Keep the car."  
6 That's a gift. But if you promised to do something in exchange  
7 for that money, there is no definition in law that I know of  
8 that qualifies that as a gift.

9 MR. SHUMATE: Your Honor, all of your hypotheticals  
10 involve subjective intentions of the giver. This is a  
11 bright-line test. The clause says no presents and no  
12 emoluments. It's not a totality of circumstances test. It's  
13 not a subjective intentions of the giver. It's not an undue  
14 influence test. It's a bright-line rule. It is a present or  
15 emolument. Those words have to have different meanings. The  
16 plaintiffs give them the exact same meaning.

17 THE COURT: You give them a third meaning, that's what  
18 I'm saying. There's one meaning to say an emolument is a gift,  
19 and your argument makes sense that an emolument must be  
20 something other than a gift otherwise it wouldn't prohibit both  
21 emoluments and gifts. But your argument is that an emolument  
22 has to be given after the President has already done something  
23 that the emolument is compensating him for. I mean, if you go  
24 back to the Domestic Emoluments Clause, the reality is that's  
25 not even true of the Domestic Emoluments Clause.



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1           If the President's salary is \$400,000, if the  
2 President gets paid the first month, that doesn't mean it's not  
3 an emolument because he hasn't done the work for that month  
4 yet. If he says, "I'm taking next month off," that doesn't  
5 change the definition of whether or not it is compensation and  
6 is defined as an emolument. It's a little difficult to talk  
7 about it in the context of the presidency because who knows  
8 what is official or not official that the President does? Some  
9 would argue everything the President does is in an official  
10 capacity not because of the job he has but because of the  
11 status he has. Everything he says or does has an effect on  
12 world-wide events and on domestic and international events.

13           And then the other part of that, the logical question  
14 is, well, am I really supposed to go through that analysis? I  
15 mean, is anyone, even Congress supposed to go through that  
16 analysis of trying to figure out whether the President really  
17 did do something in exchange for the payment that he was given  
18 where it's clear as to what they expected of him? And if he  
19 did it, did he do it because of the money? If he didn't do it,  
20 does that transform it into a gift because they didn't get it  
21 back? What makes it a gift? If they demand it back or don't  
22 demand it back, does that change whether it's a gift or an  
23 emolument? Why should that analysis be gone through by anyone?  
24 The Emoluments Clause is basically prohibiting, as you say,  
25 both gifts and emoluments, so it doesn't matter, does it? He

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1 can't take it. He can't take the money. And we know he can't  
2 take the money, and he can't take the money if it is a gift.  
3 He can't take the money if it is some compensation for  
4 something that they expect him to do.

5 This language is intended to be all inclusive. It  
6 basically says, look, you should not take anything of value  
7 from foreign governments unless Congress consents to it. Isn't  
8 that basically what the rule says? So what difference does it  
9 make? If you say that this is a gift instead of an emolument,  
10 it doesn't mean it's not still prohibited by the Emoluments  
11 Clause or at least by that provision of the Constitution,  
12 right?

13 MR. SHUMATE: But we have to find the original public  
14 meaning of the word emolument. It has to be different from the  
15 word present. At the time of the founding it's clear there are  
16 only two definitions: Ours, meaning profit arising from office  
17 or employ. Or theirs, anything of value. So the question is  
18 who's right?

19 THE COURT: I'm not sure that that is. We just talked  
20 about it. Under the Domestic Emoluments Clause, emolument  
21 seems to be compensation.

22 MR. SHUMATE: Well, compensation for his services  
23 which suggests both personal service in an exchange in the  
24 President's official capacity.

25 THE COURT: Well, compensation is always for services,

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1 isn't it?

2 MR. SHUMATE: Which just proves our point; that the  
3 compensation or the emolument is an exchange for some service.  
4 The Domestic Emoluments Clause is an exchange for the  
5 President's services as President. Therefore, we would expect  
6 the word emolument --

7 THE COURT: So you say it is only compensation if in  
8 fact the President does what is expected of him.

9 MR. SHUMATE: No, because he holds the office.  
10 Because he holds the office, he gets compensation.

11 THE COURT: Right. So that is an emolument, whether  
12 he sleeps all day or whether he works all day, right?

13 MR. SHUMATE: That's correct.

14 THE COURT: It's still an emolument.

15 MR. SHUMATE: Because the emolument arises out of his  
16 office consistent with the original public meaning, profit  
17 arising from office or employ.

18 THE COURT: It doesn't arise out of his conduct, his  
19 doing something in exchange. It arises out of his office.

20 MR. SHUMATE: Correct. Let me give you another  
21 example of a situation where the President could not do  
22 something in an employment-like capacity, or any federal  
23 official.

24 So, for example, the classic case that would be  
25 covered by the Emoluments Clause would be the President agrees

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1 to sign a treaty in exchange for compensation. Clearly, that  
2 would be a benefit, compensation, in exchange for some personal  
3 service in his official capacity, signing the treaty.

4 THE COURT: But that's inconsistent with what you  
5 already argued because you said he promised to do it. You  
6 didn't say he did it.

7 MR. SHUMATE: Well, he did it.

8 THE COURT: I'm trying to make sure I understand your  
9 argument. That's what I'm saying. It seems to me it does make  
10 sense what you just said. If he promised to do it in exchange  
11 for the money, he can't take the money because it constitutes  
12 an emolument, right? And you say no.

13 MR. SHUMATE: He could not take the money if he  
14 engages in some personal service in his official capacity.

15 THE COURT: As opposed to if he promised to engage in  
16 some official duty.

17 MR. SHUMATE: There would be some question whether  
18 that would be a present or an emolument, your Honor.

19 THE COURT: OK. we have to move past that, but I don't  
20 see the logic or the law in defining that as a present. I  
21 don't know of any situation that you could give me where one  
22 person promises to do something for a payment, and that is  
23 qualified as a gift if the person fails to do what they  
24 promised. I don't know any definition in law or logic that  
25 transforms that into a gift when you promise to do something in

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1 exchange for the payment, I give you the payment, and you  
2 breach the agreement. That doesn't transform it into a gift.

3 You cannot walk into a courtroom and, say, "Oh, he  
4 can't sue me. He gave it to me as a gift." That doesn't work.  
5 There is no legal theory that supports the position that if  
6 there is an exchange of activity for payment of money, if the  
7 person pays the money with the expectation that the other  
8 person will engage in the conduct, and the other person fails  
9 to engage in the conduct, I don't know any legal theory or  
10 reasonable logic that says I gave you a gift. I just don't  
11 understand how you could make that argument.

12 MR. SHUMATE: Your Honor, maybe it would be helpful if  
13 I moved to history because the hypotheticals we're talking  
14 about are far afield from the allegations in the Complaint.  
15 The allegations in the Complaint are that the President is  
16 receiving emoluments because he holds an interest in a company  
17 that may do business with foreign governments.

18 But history is dispositively on our side because there  
19 is no discussion in the historical record that the framers had  
20 any concern about federal officials engaging in private  
21 business pursuits, much less any concern about a federal  
22 official holding an interest in a company that may do business  
23 with a foreign government.

24 Just to be clear, your Honor, the Domestic Emoluments  
25 Clause applies to any holder of an office of profit or trust

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1 and likely would apply to any --

2 THE COURT: I'm not sure that's true. The Domestic  
3 Emoluments Clause deals with the President --

4 MR. SHUMATE: Correct.

5 THE COURT: -- and his compensation. There is a  
6 difference. Domestic Emoluments Clause is the activity of the  
7 President alone.

8 MR. SHUMATE: Correct.

9 THE COURT: The Foreign Emoluments Clause deals with  
10 other employees.

11 MR. SHUMATE: Correct. The Domestic -- excuse me, I'm  
12 sorry -- the Foreign Emoluments Clause says holders of an  
13 office of profit or trust, which would likely include judges,  
14 retired military officers, and members of Congress. So that  
15 whatever interpretation the Court reaches in this case would  
16 likely apply to every holder of an office of profit or trust,  
17 but there is no discussion in the historical record that the  
18 framers had any concern about private business pursuits.

19 In fact, it was common at the time of the founding for  
20 federal officials to be paid very low salaries or no salaries  
21 at all, and it was expected and commonplace to engage in a  
22 private business to supplement one's income. We know from the  
23 historical record that early presidents like Washington and  
24 Jefferson engaged in private business at the time they held the  
25 office.

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1           THE COURT: But why should that necessarily be taken  
2 as the definition of emoluments? The way that it is written,  
3 particularly when we're talking about the Foreign Emoluments  
4 Clause, it doesn't say the President can't -- it doesn't say  
5 anyone can't do it. It says they can do it with Congress's  
6 consent. We're not talking about George Washington or Thomas  
7 Jefferson. At that time the fact that Congress did not react,  
8 did not find this of concern to them, was silent on the issue,  
9 why should that be taken as anything than Congress's lack of  
10 concern about the issue, or why shouldn't it simply be taken as  
11 Congress's implicit consent, that there were a lot more  
12 important things going on in the world at the time that they  
13 were concerned about, and they weren't particularly concerned  
14 about George Washington selling tobacco. Even if someone went  
15 to Congress and said, "We think this is an emolument. You  
16 ought to prevent it." They might have simply said, "Well, we  
17 don't care. We're not concerned whether it's an emolument or  
18 not. We have the power to consent and we're going to consent."

19           Why is that silence -- what is it in the history that  
20 defines emolument simply because they didn't raise any concern  
21 about George Washington's conduct, or why can't that be  
22 considered some implicit consent on their part that they did  
23 not consider this to be a concern and did not consider it  
24 something that they wanted to prevent? It doesn't mean they  
25 couldn't. I don't read anything that said Congress says, "This

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1 is not an emolument. We can't stop the President from doing  
2 this, and we have no power to consent." I don't see that  
3 written any place. I don't see anybody saying that.

4 MR. SHUMATE: Your Honor, all of that proves my point;  
5 that nobody at the time of the founding up until this President  
6 ever understood the clauses to apply to forbid engaging in  
7 private business pursuits.

8 THE COURT: Well, that's interesting, and the way you  
9 characterize it in the abstract may be true, but let's go back  
10 to the treaty example. If a foreign government said to the  
11 President, "We'd like you to sign this treaty that's favorable  
12 to our country."

13 And the President says, "Well, you know, I can't."

14 And they said, "Well, we'll give you a million  
15 dollars."

16 And he says, "Well, you know, I can't accept  
17 emoluments for doing this."

18 And then they said to him, "Well, we know you own a  
19 hotdog stand. We'll buy a million dollars worth of your  
20 hotdogs."

21 Would you say that that can't be an emolument?

22 MR. SHUMATE: Well, at some point, your Honor, there  
23 may be extreme examples where something like that given--

24 THE COURT: We don't have to deal with the extreme  
25 examples. We have to deal with the more limited examples



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1 because you want me to define it for all emoluments. So that  
2 either falls within the definition of emolument or it doesn't  
3 fall within your definition.

4 MR. SHUMATE: No, it would not fall in within our  
5 definition of emolument. It may in some cases fall within the  
6 definition of a present. If you give something, give a gift  
7 far beyond any reasonable market value, that might be a present  
8 in a particular case, but if it's just a business example --

9 THE COURT: The example I gave, you you're not arguing  
10 that that's a present.

11 MR. SHUMATE: In an extreme example it could be.

12 THE COURT: The actual example I just gave you, you're  
13 not arguing that that would be a present.

14 MR. SHUMATE: It potentially could be, your Honor.

15 THE COURT: How would it be a present? If they said,  
16 "We will give you" -- if they said, "We want you to sign this  
17 treaty, and if you sign this treaty we'll buy a million dollars  
18 worth of your hotdogs, so you could put a million dollars into  
19 the bank." How is that a gift?

20 MR. SHUMATE: I think I misunderstood the  
21 hypothetical.

22 THE COURT: OK.

23 MR. SHUMATE: So, if there is a benefit conferred, yes  
24 you have a benefit. If you have personal service by the  
25 President signing the treaty, that would be in his official

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1 capacity, so it wouldn't matter if the payment is just funneled  
2 through a hotdog stand.

3 THE COURT: So it wouldn't matter whether or not it's  
4 a business transaction -- because the drafters of the  
5 Constitution probably understood that because they wanted to  
6 make sure that they said an emolument of any kind. So just  
7 because it's a business transaction doesn't necessarily mean  
8 that it can't be an emolument. Would you agree with that?

9 MR. SHUMATE: I would agree it would have to meet our  
10 definition, and in the hypothetical you provided, there would  
11 be a benefit conferred on the President in exchange for a  
12 personal service in an official capacity, signing the treaty.  
13 So I would be willing to concede if that definition is met, it  
14 wouldn't matter if the President were handed the money or if it  
15 were funneled through some business. But that is far afield  
16 from what the allegations are in the Complaint here.

17 The allegations in the Complaint here are that the  
18 President is engaging in ordinary business transactions not in  
19 exchange for anything, and we know from the historical record  
20 that early presidents participated in private business  
21 transactions. The Supreme Court said, the practices of the  
22 early presidents are entitled to significant weight.

23 What the plaintiffs want the Court to assume is that  
24 President Washington was a crook because he engaged in private  
25 business with the federal government in 1793. This is an

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1 indisputable fact: That in 1793, President Washington  
2 purchased public lots from the federal government. Under their  
3 view, anything of value, President Washington received an  
4 emolument that would be prohibited by the Domestic Emoluments  
5 Clause. Under our definition, it would not be.

6 But nobody, like you said earlier, your Honor, nobody  
7 had ever understood and nobody was ever concerned about a  
8 President or a federal official engaging in private business.  
9 That is just not what the clause was intended to protect  
10 against. The clause was intended to protect against exchanging  
11 for personal services in an official capacity for some benefit.  
12 It was not intended to regulate private business conduct.

13 Another example that they cannot explain away is the  
14 1810 constitutional amendment that was passed by Congress by a  
15 wide margin, ultimately was not ratified by two states, but  
16 what that constitutional amendment said was that any citizen  
17 that received an emolument from a foreign government would be  
18 stripped of their citizenship.

19 There is no discussion in historical record that they  
20 intended that constitutional amendment to strip the citizenship  
21 of any American engaging in business with a foreign government,  
22 foreign trade. That couldn't possibly be correct.

23 THE COURT: Well, there is no evidence that they ever  
24 ratified that. So it has absolutely no effect.

25 MR. SHUMATE: Well, it is significant, your Honor,

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1 because this was still the founding generation. James Madison  
2 was the President at the time. It was passed by Congress by a  
3 wide margin. Ultimately, was not ratified by two-thirds of the  
4 state, but it is a significant historical example.

5 If their interpretation is right -- anything of  
6 value -- that a large majority of Congress of the United States  
7 intended to strip the citizenship of any American that received  
8 anything of value from a foreign diplomat on U.S. soil, that  
9 can't be possibly be right. xxx

10 THE COURT: But the state said that wasn't right.  
11 They would not ratify such a provision.

12 MR. SHUMATE: But Congress did. You have to assume  
13 under their theory that the founding generations were idiots  
14 for doing that, and that is not an assumption --

15 THE COURT: There are people on one side of the issue  
16 and there are people on the other side of the issue. How you  
17 want to characterize it is a definition. I don't know why  
18 people voted one way or the other, and I don't know how  
19 significant that is in terms of defining -- I'm not sure what  
20 you say should be taken from that; that means what about  
21 emoluments?

22 MR. SHUMATE: That if their interpretation is correct,  
23 then the founding generation reached an absurd -- passed an  
24 absurd constitutional amendment that would have restricted  
25 trade within the country. That would have stripped the

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1 citizenship of any American that received anything of value  
2 from any foreign diplomat. No American can rent a room to an  
3 foreign diplomat on U.S. soil. That may have been a violation  
4 of international law at the time.

5 THE COURT: I'm not sure what you say that they were  
6 attempting to do.

7 MR. SHUMATE: They were attempting to prevent, I  
8 think, Americans from engaging in employment-like relationships  
9 with foreign governments. They didn't want divided loyalty.  
10 They wanted Americans to be working not for a foreign embassy  
11 on U.S. soil but working in some other capacity. That is a  
12 much more logical interpretation of what the founders intended.

13 THE COURT: Why does that define what the rules are?  
14 Why is that relevant to the rules for employees of the federal  
15 government? Just as you argued, this is an anti-bribery,  
16 anticorruption provision. This is not a provision primarily  
17 put into place for some competitive purpose, anti-competition  
18 provision. This has to do with making sure that your  
19 government is not corrupt.

20 What does that have to do with whether or not you  
21 strip a citizen who may or may not be a government employee of  
22 their citizenship particularly with regard to a provision that  
23 was never enacted into law? I'm not sure I understand what  
24 intent you say that that demonstrates on the part of Congress  
25 at the time that translates into their application of the

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1 Emoluments Clause.

2 MR. SHUMATE: Well, the word emolument is used in both  
3 clauses, both provisions, and the constitutional amendment  
4 would have applied that restriction to any American, not just  
5 the holders of an office of profit or trust.

6 The point I'm making is that it shows the absurdity of  
7 the plaintiff's interpretation. If emolument means anything of  
8 value, then we have to assume that Congress by a large margin  
9 which involved members of the founding generation, intended to  
10 strip the citizenship of any American who received anything of  
11 value from a foreign government, and that just seems  
12 implausible.

13 If I can, I'd like to explain a few more points why  
14 the plaintiff's interpretation of the word emolument, meaning  
15 anything of value, is not a reasonable interpretation. The  
16 first reason is that it leads to redundancy in the clause  
17 itself. Again, your Honor, the Foreign Emoluments Clause lists  
18 four things: Present, emolument, office and title.

19 We give present and emolument different definitions.  
20 The plaintiffs give them the same definition. They interpret  
21 emolument to mean anything of value, anything of value.

22 THE COURT: Well, the way I read your papers is that  
23 you say that certain things are emoluments. If it's not an  
24 emolument, it must be a gift. They say certain things are  
25 gifts. If it's not a gift, it must be an emolument.

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1 MR. SHUMATE: But their definition of emolument is  
2 anything of value.

3 THE COURT: Your definition of gift is anything that's  
4 not an emolument.

5 MR. SHUMATE: No, our definition of gift is a present  
6 given.

7 THE COURT: Well, a gift is anything that is not an  
8 emolument.

9 MR. SHUMATE: A gift is a present a gift given without  
10 consideration. An emolument is something different. I can't  
11 think of an example, but there may be something that falls  
12 within neither definition.

13 THE COURT: But every example I gave you was with  
14 consideration, and you said that that was a gift.

15 MR. SHUMATE: The promise in the hypothetical.

16 THE COURT: Right. That's not what you said to me.  
17 You didn't say if it's without consideration, it's a gift,  
18 because every example I gave you has consideration in it as we  
19 define it in legal terms. It is an exchange of promises which  
20 both parties are expected to be bound by, and that is legally  
21 the consideration.

22 MR. SHUMATE: I don't think the framers were concerned  
23 about an exchange of promises. They were concerned about some  
24 personal service being provided.

25 THE COURT: Well, I don't know why you would say that.

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1 I don't know why it would be logical for them not to be  
2 concerned about an exchange of promises. Why they wouldn't  
3 naturally say to themselves, look, not only do we not want the  
4 President to take this money for things he does for foreign  
5 governments; we want him to not take this money for things he  
6 promises to foreign governments. Why would that not be the  
7 more logical reading of what they did here? They said "an  
8 emolument of any kind." Are you really arguing that what they  
9 meant to do is say, you could promise them anything you want.  
10 As long as you don't follow through, you can take the money.  
11 But that can't be what they intended. They were smarter than  
12 that.

13 MR. SHUMATE: Your Honor, that hypothetical is far  
14 afield from this case.

15 THE COURT: I know, but the problem is the reason why  
16 the hypothetical is far afield from this case is because you  
17 give me a rule that I'm trying to apply to the situations you  
18 say that they should be applied to. The rule you just gave me  
19 I can't apply to that situation. So that rule is not a  
20 workable rule. So the rule must be different than just, well,  
21 the President can promise anything he wants to a foreign  
22 government and then take money in exchange for those promises  
23 from foreign governments as long as he doesn't follow through  
24 with that promise or as long as they can't prove that why he  
25 did it was because of the money. That's not what they



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1 intended.

2 MR. SHUMATE: Your Honor, let me tell you what would  
3 not be workable - their definition, anything of value. If  
4 they're right, if emolument means anything of value, no federal  
5 officer could hold stock in a company that receives income from  
6 a foreign government. No federal official could own Treasury  
7 bonds that pays interest from the federal government because  
8 that would be an emolument, something of value, received from  
9 the federal government. No official could receive royalties  
10 from the sale of books if a purchaser of that book happened to  
11 be a foreign government representative. No federal officer  
12 could receive a driver's license, a trademark, a copyright, a  
13 tax deduction. All of those things --

14 THE COURT: Wouldn't an extension of your argument be  
15 this, particularly parts of other argument. You argue that  
16 that is really a political question; that, look, they wrote the  
17 Constitution not to prohibit this for all time, but to say you  
18 can't do it unless Congress says it's OK. So the answer to  
19 that question, your answer to that question would be, no, as  
20 long as Congress says it's OK, it doesn't matter. It doesn't  
21 matter. They don't say that they're preventing the President  
22 from doing all these things. They're just saying that, "Look,  
23 if the other branch of government thinks that this is an  
24 emolument and decides that they are not going to consent, then  
25 you're going to have to rethink this."

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1 MR. SHUMATE: That's exactly right. Only Congress can  
2 grant exceptions to the Emoluments Clause. But the plaintiffs  
3 grant their own ad hoc exceptions that don't fit their theory.  
4 They have these absurd situations that fall within the  
5 definition of emolument. They try to carve them out with ad  
6 hoc exceptions, but they can't do that because, as you said,  
7 only Congress can grant those exceptions. And Congress has  
8 granted exceptions in several circumstances, with the Foreign  
9 Gifts and Decorations Act grant and de minimis exceptions for  
10 circumstances, but the question is whether something is an  
11 emolument or not. It's not a totality of the circumstances  
12 test. It's a bright-line rule. Is this an emolument or is it  
13 not? And that is problem under their definition because  
14 anything of value sweeps in everything. Again, this clause  
15 applies to judges. It applies to retired military officers.  
16 Nobody ever thought that retired miliary officers could not  
17 engage in private business. That would be the consequence of  
18 their interpretation.

19 So, your Honor, respectfully, if you agree with our  
20 interpretation of the word emolument, the plaintiffs have  
21 failed to state a claim because there is no allegation in the  
22 Complaint that the President is receiving a benefit in exchange  
23 for personal service in his official capacity or in an  
24 employment capacity.

25 Your Honor, if I may reserve some time for rebuttal.

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1 THE COURT: Surely.

2 Mr. Gupta, did you want to start?

3 MR. GUPTA: Good morning, your Honor. Deepak Gupta.

4 THE COURT: Let's take a short break. I want to take  
5 a five minute break. Our equipment may not be functioning  
6 properly. Take literally five minutes.

7 (Recess)

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1 MR. GUPTA: Good morning, your Honor.

2 I'd like to address three issues. I would first like  
3 to start by explaining why the plaintiffs have standing.

4 Then I want to address the government's view that the  
5 president is above the law and the extreme suggestion that we  
6 just heard that the Court lacks even the power to declare what  
7 the law is with respect to the President.

8 Then I want to address the government's contrived  
9 reading of the emoluments clause, which would, as some of your  
10 Honor's questions suggested, transform a broad prophylactic  
11 anti-corruption rule into effectively a bribery prohibition,  
12 something that is elsewhere addressed in the Constitution.

13 And then I would like to turn the podium over to my  
14 colleague, Mr. Sellers, who will address the way, if the Court  
15 were to deny the motion to dismiss, we would approach discovery  
16 in this case, how we would try and litigate the case, and how  
17 we would approach the question of remedy.

18 So first, why the plaintiffs have standing. Now, most  
19 of the plaintiffs are proceeding under a theory of competitor  
20 injury, so I think it makes sense to start there.

21 The purpose of the emoluments clauses is to ensure  
22 that public officials do not profit at the expense of the  
23 citizenry. Now, of course that harms all citizens, but it  
24 uniquely harms competitors in the marketplace who are doing  
25 business with a public official who is profiting from that

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1 office in the market. And that is why these plaintiffs are the  
2 ideal plaintiffs, along with CREW, to come forward and assert  
3 these violations.

4 Now, in the government's motion to dismiss, it largely  
5 alleges that the competition we claim is speculative; there are  
6 lots of restaurants and hotels in New York, in Washington,  
7 D.C., and so we can't possibly show competitor standing. But  
8 by the time of the reply brief, the government, faced with the  
9 unrebutted expert testimony that we've provided, from experts  
10 in the hotel and restaurant industries in New York and  
11 Washington, largely retreats into an attack on the competitor  
12 standing doctrine itself. Because they can't deny that we have  
13 standing under the law as it exists, they attack that law.

14 The competitor standing doctrine is a well-established  
15 doctrine. It comes from the Supreme Court. It's been  
16 recognized by the Second Circuit and by circuits around the  
17 country. And we cite over a dozen cases recognizing the  
18 doctrine and allowing standing in circumstances where the  
19 competition is much less substantiated than it is here, where  
20 you have competition, for example, in a national market and  
21 somebody shows that they participated in that market and there  
22 is some action either by the government or by a competitor that  
23 allegedly harms them.

24 Here, what we've shown is much more specific and much  
25 more direct. And, again, it's unrebutted. We have expert

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1 declarations, experts on the hotel and restaurant industry,  
2 including the former dean of the Boston University hospitality  
3 school, who explain in detail why specific hotel and restaurant  
4 plaintiffs in this case are competing with the defendant's  
5 properties.

6 And so I thought it would be useful to give you just a  
7 few examples to show how concrete and how specific the  
8 competition is. So imagine that you are at a United Nations  
9 permanent mission here in New York. You want to plan an  
10 embassy function. You want to rent out a room. And you want  
11 it to be in a high-end restaurant in Midtown Manhattan, a  
12 restaurant ranked by Michelin as two or three stars. The  
13 number of choices you have at that point is down to a universe  
14 of seven restaurants. If you don't want sushi, you're down to  
15 four restaurants. One of those restaurants is Jean Georges at  
16 the Trump International Hotel in New York, and a few blocks  
17 away, one of those restaurants is The Modern, one of the ROC  
18 restaurants, under which ROC is asserting standing in this  
19 case.

20 So already the universe is very, very small, and we  
21 know that those restaurants compete for foreign government and  
22 domestic government business. If you go to Jean Georges, there  
23 is a prix fixe menu for \$208. If you go to the Modern, there  
24 is a prix fixe menu for \$208. The prices are the same, which  
25 shows not only are they in direct competition, but they show

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1 that they are in direct competition.

2 If you want to hold an event downtown, again, for a  
3 foreign or domestic government and you want to do it at a  
4 hotel, let's say you are looking at the Trump Soho Hotel. The  
5 Trump Soho Hotel is four blocks from Houston Street. Another  
6 four blocks from Houston Street is the Bowery Hotel, owned by  
7 plaintiff Eric Goode. Condé Nast recently did ratings of  
8 hotels in New York. The Trump property was ranked 35. Eric  
9 Goode's property, the Bowery, was ranked 33. They have almost  
10 an identical raw score. If you wanted to book a room, a  
11 king-sized bedroom, at one of these hotels tonight, the price  
12 would differ by only one dollar. That shows again, these  
13 hotels are not just in direct competition, but they recognize  
14 that they are in direct competition. They have the bed spaces.  
15 They have meals they can offer. But what our clients can't  
16 offer is the ability to curry favor with the President of the  
17 United States.

18 THE COURT: Where do they get that right? If this  
19 isn't -- you don't have a claim for unfair competition -- and  
20 let's talk about first the zone of interest. That is not the  
21 intent of this provision of the Constitution. It is not an  
22 anti-competitive provision. It's not a provision to protect  
23 competition. It is an anti-corruption provision. So it's not  
24 intended to protect, provide a right specifically to protect  
25 individuals from competition. In fact, it really does very

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1 little about that issue, because, as you indicated, you're only  
2 talking about asserting, under the provision, an injury that  
3 you say arises out of government -- U.S. and non-U.S.  
4 government patrons.

5 MR. GUPTA: Right.

6 THE COURT: I would assume that you have, all of the  
7 plaintiffs have a great number of individual claims. If most  
8 of the people in this room who don't work for the federal  
9 government decide they want to go to one of the other hotels,  
10 the President's hotel, because they would like to get his  
11 autograph or curry favor or whatever reason that they want to  
12 go to his hotel, this provision doesn't protect you from that  
13 unfair competition, that you can't compete with the President  
14 because the person who lives in Kansas and decides he wants to  
15 go visit Washington, D.C., decides, you know what, I've got two  
16 choices, I could stay at the plaintiff's hotel or I could stay  
17 at the President's hotel, you know what, he's the President  
18 right now, so let's go stay at the President's hotel. This  
19 provision doesn't protect any of the plaintiffs from that.  
20 Where do you get this into the zone of interest and where do  
21 you get this as the injury caused by his violation of the  
22 emoluments clause, when it's clear that, as they say, as unfair  
23 as the plaintiffs may think it is that they can't compete with  
24 the President's hotel because people are going to have that  
25 other incentive to go to his hotel or his restaurant rather



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1 than theirs, the law doesn't protect them from that, and you  
2 don't claim the law protects them from that. So how is this  
3 within the zone of interest and how is this an injury that's  
4 caused by his violation of the emoluments clause, when they're  
5 going to suffer that injury anyway? It's not going to be less  
6 competitive in that regard. It doesn't eliminate or reduce the  
7 competition or patrons simply by saying a foreign government,  
8 or the U.S. government, under your theory, shouldn't be able to  
9 book into his hotel because of the emoluments clause.

10 MR. GUPTA: Sure. So, your Honor, you addressed a  
11 number of topics: the purpose of the clause, the zone of  
12 interest test, and also the issue of causation. So let me take  
13 them in turn.

14 First, I think you're right that this is a broad  
15 anti-corruption provision. That was the purpose of the  
16 amendment. It's pretty clear from the ratification debates and  
17 all of the history. It was a clause aimed at preventing  
18 officials from profiting at the expense of the citizenry.

19 THE COURT: That's too broad a statement. A lot of  
20 things are intended to do that. It's intended to do that in a  
21 particular way.

22 MR. GUPTA: That's right.

23 THE COURT: And the only way that it intends to do  
24 that, as articulated, is that it doesn't want foreign  
25 governments to influence a federal government official, not

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1 just the President. And it doesn't want -- it was clear at the  
2 time, when there was great debate about these united states, it  
3 was clear at the time that they did not want particular states  
4 to have undue influence. They didn't want the state of  
5 Virginia to get more advantages because the President was from  
6 Virginia. That was the intent. It wasn't about whether or not  
7 the tobacco farmer who was in the market when George Washington  
8 was in the market was saying, well, wait a minute, that's the  
9 President, how am I supposed to compete against him? You're  
10 going to go over there and buy your tobacco from George  
11 Washington instead of buying it from John Doe. John Doe  
12 doesn't have a complaint under the emoluments clause.

13 MR. GUPTA: Right. So if I understand what your Honor  
14 is saying, I think it's basically right, that the clause had a  
15 purpose. The framers of the Constitution probably weren't  
16 thinking particularly about competitors, individuals when they  
17 drafted the clause. We've alleged a violation of the clause.  
18 And we have alleged that those violations harm us. I want to  
19 get to explaining exactly why that is. But your question is,  
20 even if you have all of that, how do you have a federal case if  
21 you're not within the zone of interest of the clause?

22 And I think you could ask the same question about the  
23 plaintiffs in the *Free Enterprise Fund*, where an accounting  
24 firm was alleging that the way that an accounting regulatory  
25 body was constructed violated the separation of powers. You

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1 could have asked the same question in *INS v. Chadha*, where an  
2 immigrant who would have been sent out of the country was  
3 complaining that the way the law had been promulgated violated  
4 the bicameralism and presentment clauses in the Constitution.  
5 You could have said the same thing in *Bond v. United States*  
6 where a criminal defendant was complaining about Tenth  
7 Amendment questions. These are all examples where a litigant  
8 is invoking structural provisions of the Constitution.

9 And when the framers drafted those provisions, they  
10 weren't intending to confer particular rights. It's not alike  
11 a provision in the Bill of Rights. And what the Supreme Court  
12 said -- and I think the best case to look to this, your Honor,  
13 is *Bond* -- when you otherwise have a justiciable case or  
14 controversy, in other words, if you otherwise have plaintiffs,  
15 as we do under the competitor standing doctrine and the  
16 organization standing doctrine, who have been injured, who have  
17 a harm that they're pointing to, it's caused by the violations  
18 and the court can do something about it with either a  
19 declaration or an injunction, then you can hear that case and  
20 you don't ask, is this within the zone of interest.

21 Another case I would point to is the Supreme Court's  
22 recent decision in *Lexmark*, which makes clear that whatever  
23 else the court may have said in the past about the zone of  
24 interest test, that it's now largely a matter of statutory  
25 interpretation. And so if we were proceeding under a typical

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1 statute and we weren't the sort of person Congress intended to  
2 proceed under that statute, then that question would be  
3 relevant. But it's not relevant here, where we're alleging a  
4 violation of a structural provision of the Constitution.

5 And I want to be clear; you're right that the  
6 President is also visiting his properties one out of every few  
7 days in office, he's promoting his properties, and there are a  
8 lot of folks who are going to be going to his properties  
9 because of that, and we can't do anything about that. That  
10 doesn't violate the emoluments clauses, because they're not  
11 foreign-government officials or domestic officials. But we are  
12 in competition with his properties for that government  
13 business, and it unquestionably harms us.

14 If you look at plaintiff Jill Phaneuf, who the  
15 government started with in their presentation today, her only  
16 job is booking events at these hotels in Embassy Row in  
17 Washington, D.C., that are with governments, either foreign  
18 governments or domestic governments. So she is unquestionably  
19 harmed. When the Trump International hotel hires --

20 THE COURT: She is theoretically harmed. She's not  
21 unquestionably harmed, because you have made no allegation that  
22 she has lost any business.

23 MR. GUPTA: I want to be clear about that, because I  
24 think that's a misstatement that the government made today,  
25 that I think is really important to unpack. If you look at the

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1 competitor standing doctrine cases -- and I would especially  
2 recommend the *Traffic School* case, *Adams v. Watson*, and the  
3 *Canadian Lumber* case, what they explain is that you don't come  
4 into court with competitor standing and have to show lost  
5 sales, because of course that's often going to be very hard to  
6 do, whether it's an antitrust case or an unfair competition  
7 case. Instead what you have to show is that you are a  
8 competitor in the market with the defendant and that there is  
9 some advantage that the defendant is getting as a result of  
10 what you claim is illegal. And under those circumstances,  
11 there is a presumption that the plaintiff has been harmed.

12 THE COURT: Well, what is the assertion that she's a  
13 competitor in the market with the President? What is that  
14 fact? What is the fact that that conclusion would be based on?

15 MR. GUPTA: Well, we have other declaration where she  
16 explains that she is in this market.

17 THE COURT: Well, she explains what?

18 MR. GUPTA: She explains that her job is booking  
19 events for --

20 THE COURT: Right. That doesn't tell me she's in  
21 competition with the President.

22 MR. GUPTA: Well, with respect to the hotel and  
23 restaurant plaintiffs, we have expert declarations that explain  
24 in detail -- these are experts on competition in the hotel and  
25 restaurant industry. And they have explained, in detail, how

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1 competition works in those industries and how you isolate all  
2 the variables, as I was doing with those restaurants in New  
3 York and the hotels in New York. It is undeniable that these  
4 businesses are in direct competition with one another.

5 THE COURT: Well, when you say that, that's not my  
6 analysis. My analysis is, is it undeniable that the  
7 President's restaurants are in competition with the plaintiff.

8 MR. GUPTA: Yes.

9 THE COURT: So what is it that I should extrapolate  
10 from the experts that's supposed to give me a factual basis to  
11 say that she is one of those in competition with the President?

12 MR. GUPTA: Right. Well, it's true that the expert  
13 declarations don't address her business to the same degree that  
14 they address the hotels and restaurants. But --

15 THE COURT: Well, to what extent -- just give me an  
16 example of what the experts say that would be a basis on which  
17 I should find that she is in direct competition with the  
18 President.

19 MR. GUPTA: Well, the experts explain that the Trump  
20 businesses, the Trump International Hotel in Washington and its  
21 restaurants, are seeking out government business, particularly  
22 foreign government business. You also have the allegations in  
23 the complaint which show that they have hired a director of  
24 diplomatic sales. They did a briefing for embassies where they  
25 sought their business.

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1 THE COURT: Based on a factor like that, you could ask  
2 me to conclude that somebody who has a restaurant in Japan is  
3 in competition with the President.

4 MR. GUPTA: No, not at all, your Honor.

5 THE COURT: So wouldn't that advance her argument that  
6 she is a proper plaintiff because she has suffered a concrete  
7 and particularized injury?

8 MR. GUPTA: So what the experts explain is that not  
9 every hotel or every restaurant in the city are competing with  
10 one another, certainly not one in Japan. Instead, competition  
11 breaks down into a few factors, and they break them down. One  
12 is geographic proximity. The other is the class of the  
13 restaurant, the prices, the ratings by objective rating  
14 services.

15 THE COURT: She doesn't have a restaurant.

16 MR. GUPTA: No. She works for the Kimpton Hotels,  
17 which are high-end hotels in Washington, D.C., that are in  
18 Embassy Row. And those hotels attract foreign government  
19 business, just as José Andrés' restaurants, that are within  
20 three blocks of the Trump International Hotel -- these are very  
21 high-end restaurants, that have foreign government business.  
22 And that is explained in the declaration.

23 THE COURT: But if she is never -- if the President  
24 doesn't have one of her former customers, she can't say that  
25 she sought customer A and the President also sought customer A

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1 and customer A went to the President. If she just says, well,  
2 you know, I do catering, so take all the experts' testimony and  
3 extrapolate from that that he must be taking business from me.  
4 I can't make it on that basis.

5 MR. GUPTA: I totally agree. There is a spectrum.  
6 And we are not saying, oh, we're just kind of in the same  
7 business. Nor are we saying, for every one of these plaintiffs  
8 you can point to a particular customer that the President took  
9 away. And if you read the competitor standing cases, they're  
10 all about this spectrum and where you draw the line.

11 THE COURT: So where does she fit on that spectrum?

12 MR. GUPTA: She is a competitor of the Trump --

13 THE COURT: Well, how? Tell me how she is a  
14 competitor.

15 MR. GUPTA: Because she is seeking to secure events at  
16 two high-end embassy hotels in Washington D.C. that have in the  
17 past had foreign government business and can be expected to  
18 continue to do so. Same thing with the restaurant --

19 THE COURT: That means, since this President, she has  
20 gotten less business, or you want me to extrapolate that she  
21 would have gotten more business than she was getting in the  
22 past had it not been for this President? How am I supposed to  
23 make that?

24 MR. GUPTA: If you read the cases about competitor  
25 standing, and especially I would recommend *Adams v. Watson*,



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1 what they say is, in any case like this, like -- take a typical  
2 antitrust case where somebody is alleging monopoly competition,  
3 right, you walk into court. It's always going to be about a  
4 counterfactual world, right, your Honor. It's always going to  
5 be about what would have happened had this person not had legal  
6 monopolization, had they not been taking bribes. Imagine that  
7 I am a construction company and I am competing for construction  
8 contracts with the government, and somebody else's construction  
9 company is engaging in kickbacks or bribes. Now, can I prove  
10 that I would have got the contract had they not engaged in  
11 those kickbacks? I may not be able to prove that, certainly  
12 not at the pleadings stage.

13 THE COURT: But otherwise you would have to  
14 demonstrate that you are in fact in competition.

15 MR. GUPTA: Exactly. That's what we have to do.

16 THE COURT: So I'm trying to figure out in what way I  
17 am supposed -- if the experts say nothing about this plaintiff,  
18 make no conclusions about this individual plaintiff, am I  
19 supposed to take from that that everybody who is in the  
20 restaurant or hotel business who happens to be in D.C. is a  
21 potential plaintiff?

22 MR. GUPTA: No. No. I mean, for most of the  
23 plaintiffs, the experts have specific conclusions. I think  
24 you're only asking about Jill Phaneuf. But she is in some ways  
25 the most obvious, if you're just looking at the allegations in

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1 the complaint, the most obvious competition, because the only  
2 thing that she does -- and her compensation comes as a  
3 percentage of revenue -- the only thing that she does is these  
4 kind of high-end embassy events at an Embassy Row hotel.

5 Now, we also have Eric Goode's hotels in New York, and  
6 I already discussed the Bowery Hotel. We have the Restaurant  
7 Opportunities Center, which is an association of hundreds of  
8 restaurants, including some very high-end restaurants in New  
9 York City, including one I mentioned and many in D.C.

10 So if you take a look at the expert declarations,  
11 which, again, are unrebutted, I think they more than show what  
12 we need at the pleadings stage.

13 And government hasn't pointed to a single case from  
14 anywhere in the country in which any court has tossed out a  
15 case proceeding on competitor injury standing where you have  
16 this kind of unrebutted evidence of direct market competition.

17 What they say in their reply brief is really an attack  
18 of the competitor standing doctrine itself. They say that we  
19 don't have standing because it relies on the actions of third  
20 parties, meaning buyers in the marketplace. Well, of course  
21 that's always going to be true in any competitor standing case.  
22 And the only case they rely on for that proposition is actually  
23 one where the alleged competitor that was being sued was doing  
24 worse than the plaintiff. So, you know, of course they don't  
25 have competitor standing.

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1           And if I can, if your Honor doesn't have any more  
2       questions about competitor standing, I would like to turn to  
3       the *Havens* standing, which is CREW's standing. So CREW's  
4       standing is based -- and, again, the pattern is similar here.  
5       The government's arguments are really ultimately an attack on  
6       the doctrine itself, on the law as it's been established both  
7       in the Supreme Court and in the Second Circuit. The Second  
8       Circuit has been clear since *Havens* that there is a test for  
9       how you determine whether a nonprofit organization that is  
10      carrying out its established mission and has to divert  
11      resources as a result of alleged legal violations, have they  
12      got standing. And the test is, is there a perceptible  
13      impairment on their resources? In some of these cases, like  
14      *Nnebe v. Daus*, the Second Circuit has said, even if the  
15      impairment is scant, if the organization spent some resources  
16      through the course of the year because of those legal  
17      violations, that's sufficient.

18           So here you have CREW. It's an established  
19      organization. It's a nonpartisan group in Washington that is  
20      headed by the top ethics lawyer from the Obama White House and  
21      from the Bush White House? And what it does is conflicts of  
22      interest in government. It would be a complete abdication of  
23      CREW's established mission if, in the face of the unprecedented  
24      conflicts of interest, CREW did nothing.

25           THE COURT: Let's start with a basic proposition, a

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1 legal proposition, and see if you agree with it. "An  
2 organization cannot manufacture an injury for the purpose of  
3 standing by incurring litigation costs or simply choosing to  
4 spend money fixing a problem that otherwise would not affect  
5 the organization at all. It must instead show that it would  
6 have suffered some other injury if it had not diverted  
7 resources to counteracting the problem." Do you agree with  
8 that proposition?

9 MR. GUPTA: No. That's where the government goes  
10 astray. You've isolated exactly where they go wrong. And  
11 frankly they make that up.

12 THE COURT: They didn't make that up. I just quoted  
13 it from the Ninth Circuit.

14 MR. GUPTA: Right. But that's not the rule in the  
15 Second Circuit.

16 THE COURT: I understand that.

17 MR. GUPTA: They would like that to be the law in the  
18 Second Circuit. But the Second Circuit has consistently  
19 rejected that rule.

20 THE COURT: All right. But let me ask you this with  
21 regard to the rule. You don't meet that rule. You don't  
22 allege any injury other than the money you have to spend suing  
23 the President.

24 MR. GUPTA: Well, that's basically right. We  
25 allege -- no, no, it's not just suing the President. It's the

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1 research activities that we've engaged in, the communications  
2 activities and legal activities that are not just this raw  
3 suit.

4 THE COURT: But you don't allege any other injury  
5 that's caused by the President's action to CREW, other than the  
6 fact that CREW is expending energy to fight and litigate this  
7 issue with the President.

8 MR. GUPTA: I would say it differently, but I don't  
9 want to punch you too hard.

10 THE COURT: You could say it differently, but I'm just  
11 trying to figure out where you're defining the injury. You're  
12 not claiming that CREW -- in most cases, the examples that we  
13 have are situations where a statute or some rule has put a  
14 burden on a particular plaintiff. And that burden is defined  
15 as the injury that the plaintiff has the right to sue about.  
16 You would agree that you don't have standing to sue simply  
17 because you don't like what's going on.

18 MR. GUPTA: Absolutely.

19 THE COURT: And you can't change it into standing by  
20 saying, well, it forced me to have to sue the person who was  
21 doing what I didn't like. That's not standing.

22 MR. GUPTA: That's not our theory of standing. Our  
23 theory of standing is just like the CREW case itself and the  
24 Second Circuit cases interpreting CREW. Some of those are  
25 constitutional cases like this one. They're not just statutory

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1 cases. And in one of those cases, for example, you have an  
2 organization, what they do, their typical activity, consistent  
3 with their established mission -- this is the *Ragin* case, the  
4 leading case in the Second Circuit -- is to do information  
5 sessions for the community about housing discrimination, much  
6 like CREW's job is to put out information about conflicts of it  
7 with the government.

8 THE COURT: Well, CREW's job hasn't been, for the 200  
9 years, to put out issues about whether the President violated  
10 the emoluments clause.

11 MR. GUPTA: If you define it at that level of  
12 generality, no. But that's only because, you know, I mean, the  
13 last White House, when they had an emoluments issue, they  
14 sought an Office of Legal Counsel opinion. Had that President  
15 been violating the emoluments clause, CREW would have been  
16 saying the same thing.

17 THE COURT: Right. But that's their choice. They're  
18 not forced to do that. That is their argument --

19 MR. GUPTA: That is their argument, yes.

20 THE COURT: -- that you can't simply say that they  
21 made a choice, that they disagree with it, so it's the  
22 President's fault that they have to put resources into trying  
23 to defeat him on this issue.

24 MR. GUPTA: You have accurately characterized their  
25 argument. And let me tell you what the problem with their

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1 argument is. You could say the same thing about just about all  
2 of the *Havens* cases.

3 THE COURT: Well, no, that's not true. In most of the  
4 *Havens* cases you can't, if not all of the *Havens* cases, you  
5 can't say the same thing, because there is a direct injury that  
6 the organizations can point to that is a result of whatever  
7 independent action has been taken and not as a result of their  
8 simply saying, well, I want to sue them because I don't like  
9 what's going on.

10 MR. GUPTA: I don't think that's true. If you look at  
11 the *Ragin* case, for example, it's a housing organization. It  
12 put out information to the community about how to fight housing  
13 discrimination. And then this developer, that they hadn't been  
14 dealing with before, started putting out ads that the  
15 organization thought were racially discriminatory. And they  
16 diverted their resources to investigating that problem and  
17 counteracting it. And part of that included an effort to,  
18 ultimately, to challenge those practices in court. And the  
19 Second Circuit said you have standing.

20 THE COURT: But what the courts concentrated on was  
21 not the nature of the fight with the defendant. It was the  
22 nature of the consequences of the act by the defendant that  
23 they found, that the plaintiff had to respond to protect  
24 people's rights, individually, because what was being done was  
25 violative of those individual rights. And the only way to

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1 vindicate that was to expend money that they would have used  
2 for another purpose. I'm not sure what you say that CREW is  
3 doing to protect whom, other than suing the President to prove  
4 that he is wrong.

5 MR. GUPTA: Oh, it's not just suing the President to  
6 prove that he is wrong. This is an organization that polices  
7 conflicts of interest rules. That's what it does. These  
8 violations came about. And they're fulfilling their  
9 established mission.

10 THE COURT: Right. But then this is part of their  
11 established mission.

12 MR. GUPTA: Exactly.

13 THE COURT: It's not diverting resources. They want  
14 to play police. If they're policemen, then they're going to --  
15 you can't say, well, our role as policemen gives us the  
16 standing to sue anybody that we decide, as police, we want to  
17 arrest.

18 MR. GUPTA: Yes, that's right. But I think, if you  
19 look at the Second Circuit cases, like *Ragin*, like *Nnebe*, they  
20 fail the government's test. And that proves that that's not  
21 the law of the Second Circuit. If you look at the facts of  
22 those cases, you will not find some harm to those organizations  
23 that preexisted the distraction of resources. And the Second  
24 Circuit doesn't identify that as something that's required.

25 THE COURT: That's true. But the distraction of



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1 resources is pointed to as something else other than the  
2 litigation. And the only thing I hear you saying about how  
3 CREW has been injured, in the way that they have been injured  
4 by diverting their resources, is that before -- somehow there  
5 is an injury separate from the litigation that amounts to some  
6 extra research that they had to do to figure out whether the  
7 President was violating the emoluments clause.

8 MR. GUPTA: Let me be much clear, then, because I  
9 misspoke if that's the impression that I left you with. So,  
10 for example, before the emoluments violations, CREW had put out  
11 17 reports about money in politics, what they were doing.  
12 Since the emoluments clause violations, they have put out two.  
13 All of their research staff has had to be diverted to these  
14 issues.

15 THE COURT: Well, it didn't have to be diverted to  
16 these issues. They made a choice to divert them. That's the  
17 biggest distinction that I see in this case and the cases that  
18 you've cited, is the "has to" question.

19 MR. GUPTA: But it's not a distinction with the cases,  
20 right. In all of those cases you could have said, look, that  
21 organization didn't have to deal with those racially  
22 discriminatory ads, they didn't have to deal with what that  
23 housing developer was doing, they made a choice, because of the  
24 illegality, to do something about it.

25 THE COURT: No. But in each of those cases they

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1 articulated a way in which they or their constituents were  
2 being harmed other than their diverting their resources to  
3 opine on this issue.

4 MR. GUPTA: I think it's important, if you go back to  
5 *Havens* -- you mentioned constituents, your Honor -- if you go  
6 back to *Havens*, the court rejected, in an alternative basis of  
7 standing, which would have been representational standing, that  
8 standing would have relied on the injury to members or clients  
9 or constituents. That wasn't the theory that the court  
10 adopted. The *Havens* theory that we're relying on is the  
11 injured organization itself and its distraction of resources.  
12 And it includes organizations, you know, in the Second  
13 Circuit's cases, like the New York Civil Liberties Union, like  
14 a mental health law clinic.

15 THE COURT: So any organization that is a, quote, good  
16 government organization, why couldn't they make the same  
17 argument and say, well, we're a plaintiff too? Why does that  
18 just make them a plaintiff, because they're a good government  
19 organization and they say, well, we've got ten things that are  
20 bad government, we're going to put out a report on nine of  
21 them, but we don't like this one, so we won't do our nine  
22 reports on this one, we'll do one report, and then we'll do  
23 nine other reports on emoluments? So why is that an injury?

24 MR. GUPTA: You could have said about the same thing  
25 about the New York Civil Liberties Union, which has a much

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1 broader mission, and in that case was helping with First  
2 Amendment rights relating to taxicab proceedings in New York.

3 THE COURT: Right. But they were specifically taking  
4 action that would redress or benefit taxi drivers because of  
5 the circumstance that had been forced upon them. That's not  
6 this kind of situation. It's clear that the harm is not an  
7 individual harm that they are trying to redress on behalf of  
8 any other representative or individual plaintiffs, who have to  
9 respond to what the President is doing because they've been  
10 harmed, in and of itself, by what the President is doing.  
11 They're not taking that position. There are others who are  
12 taking that position. But CREW is not taking that. CREW is  
13 not -- I don't know who has ever thought about the emoluments  
14 clause before this. Most people have not. So I don't know  
15 what made CREW, forced CREW, how did the President force CREW  
16 into suffering all of this expenditure of resources simply  
17 because they want to pick a fight with the President?

18 MR. GUPTA: Right. Well, believe it or not, CREW is  
19 an organization that has people that are experts in these  
20 clauses. They have government ethics lawyers who dealt with  
21 this as a matter of practice within the government. So if any  
22 organization is going to be well situated to address this  
23 problem, it's CREW.

24 I think your Honor understands the arguments on CREW's  
25 standing, and I think you understand the objections from the

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1 other side. They are arguments that could be made in the  
2 Supreme Court, in a higher court, about whether to limit *Havens*  
3 standing, but as the standing doctrine has been developed in  
4 the Second Circuit, I think we fall squarely within that  
5 doctrine.

6 And so unless you have other questions about *Havens*  
7 standing, what I would like to turn to is the argument that we  
8 heard from the government this morning, that this Court lacks  
9 the power to issue relief against the President.

10 THE COURT: Well, the only other thing I wanted to  
11 address, before you get there, or after you do that, is still  
12 the question of causation. If there's still an  
13 anti-competitive effect by the President being able to appeal  
14 to patrons who may want to come his restaurant and hotels  
15 instead of the plaintiff, and that is going to occur, no matter  
16 what, how do you trace that as an injury caused by a violation  
17 of the emoluments clause, when they will have to suffer that  
18 injury regardless?

19 MR. GUPTA: I think you're asking a question about  
20 causation and redressability, right?

21 THE COURT: Yes.

22 MR. GUPTA: And so causation, the competitor standing  
23 cases explain this. Take an example, an easy example that's  
24 sort of an abstract unrealistic one. Imagine that there are  
25 only two companies in a market. And one company is doing

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1 something anti-competitive and illegal. It's obvious. Nobody  
2 in their right mind would deny, you don't have to have a Ph.D.  
3 in economics to know that that's going to harm the other person  
4 in the market and they can sue. So the relevant question  
5 becomes what's the market and how diffuse can the market be.  
6 And so you have competitor standing cases like the *Association*  
7 *of Data Processing* case from the Supreme Court where it's a  
8 national market, and the Supreme Court says, they're all in the  
9 same market, this might harm you, good enough. What we have  
10 here is much more granular. We've shown competition in the  
11 same market. And what these cases -- and I point to the  
12 *Traffic School* case. That was a case where you had companies  
13 that ran online training programs, driving schools, and one of  
14 the schools, the defendant, was claiming an affiliation with  
15 the government. Now, the plaintiffs couldn't prove that they  
16 had lost, at least at the pleadings stage, couldn't prove that  
17 they had lost specific sales. But what the court said is that,  
18 you know, you've shown that you're competing in the same  
19 marketplace and the laws of economics are such that that is a  
20 competitive harm. And that competitive harm is an actual harm  
21 you're suffering.

22 THE COURT: But the laws of economics doesn't support  
23 a conclusion that the competitive injury, as I'll call it, is  
24 caused by the violation of the emoluments clause, when we know  
25 that that competition, competitive injury, is going to have to

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1 be suffered in any event, because the emoluments clause doesn't  
2 decide who gets to patronize your hotel.

3 MR. GUPTA: No. I think the point is you have to look  
4 at the relevant conduct. And the conduct is that the  
5 defendants' properties are receiving payments from foreign  
6 governments -- and you don't have to speculate about this, your  
7 Honor; we have allegations in the complaint that are specific  
8 about this -- where if diplomats are bragging that they're  
9 going to the President's hotel to curry favor with him, if you  
10 were in that marketplace and your job was to try to get  
11 diplomatic sales, you've lost sales because people are making  
12 those payments that are prohibited by the Constitution.

13 THE COURT: I'm not sure I can articulate it that way.  
14 You've lost sales because the President of the United States is  
15 in this business. That's why you're losing sales. Because  
16 you're losing sales even if you're not violating the  
17 emoluments, even if he's not violating the emoluments clause.  
18 So the loss of sales is not directly attributable to the  
19 emoluments clause. The loss of sales is attributable to the  
20 fact that he is now the President and people want to patronize,  
21 for whatever reason, they want to patronize his facilities  
22 rather than your facilities. To trace the injury, the injury  
23 would have to be more accurately characterized as an injury  
24 that is suffered because he is now the President, not an injury  
25 that is suffered because he's violating the emoluments clause,

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1 because even when he's not violating the emoluments clause,  
2 you're still suffering that injury.

3 MR. GUPTA: To be perfectly precise, the relevant  
4 market is the market for government business, for foreign  
5 government business, for domestic government business.

6 THE COURT: Why is that the relevant market? Only  
7 because that's the only one that fits into the emoluments  
8 clause? Why isn't the relevant market the patrons who  
9 patronize the hotel?

10 MR. GUPTA: No, because that's where the alleged legal  
11 violations were. If this was a regular commercial case and you  
12 had two competitors and you were alleging the kind of kickback  
13 scenario I described earlier, let's say I sell to different  
14 kinds of -- I do all sorts of construction jobs, right, but the  
15 relevant market between the two competitors, if you were trying  
16 to determine whether there was standing, would be their  
17 competition for government business, let's say in Rhode Island,  
18 OK, where those kickbacks were occurring. And you would have  
19 to determine, are they relevant competitors in that  
20 marketplace. There's nothing strange or exotic about this.  
21 This happens all the time in antitrust cases, unfair  
22 competition cases, cases involving regulations. And the  
23 government hasn't suggested that this kind of well-established  
24 standing doctrine shouldn't apply in this circumstance.

25 THE COURT: But it's sort of like saying, well, the

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1 bridge is out and we drove off the bridge, and everybody died.  
2 You were driving a Ford, I was driving a GM car. You want to  
3 say that what caused us to drive off the bridge and to drown is  
4 because you were driving a Ford. That's not the reason that  
5 you suffered that injury. It may be consistent with that  
6 happening. But the reason you suffered the injury is because  
7 the bridge was out. Here, the reason that the plaintiff is  
8 suffering injury is not because the President is violating the  
9 emoluments cause, because even if he doesn't violate the  
10 emoluments clause you're still suffering this -- you concede  
11 that they're suffering an anti-competitive injury. And the  
12 same injury other -- I guess other than -- well, I'd have to  
13 evaluate other than CREW's -- I don't know if it would apply to  
14 CREW. But if the injury is really traceable to the lack of  
15 competition that is engendered by the President's owning  
16 hotels, to sort of say, well, there's a bunch of hotels that he  
17 has that have his name on it, so we say, it's the hotel that  
18 has his name on it that's causing us injury -- no, that's not  
19 what causing injury. It could be the hotel that doesn't have  
20 his name on it, it's still causing you injury. So how do you  
21 trace that injury to the emoluments clause?

22 MR. GUPTA: I think, to give you a concrete example  
23 involving this case and what we're going to prove if the case  
24 moves forward -- so the Trump International Hotel in D.C. has  
25 much higher rates than comparable hotels in -- much, much



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1 higher rates than comparable hotels in D.C., and the rates have  
2 gone up substantially since the election.

3 THE COURT: For both foreign government and U.S.  
4 citizens.

5 MR. GUPTA: This is the point that I want to make.  
6 The occupancy at that hotel has gone down -- not down, I mean,  
7 it's just opened -- but is much, much lower than comparable  
8 hotels. So they're making a high profit, but there are not a  
9 lot of people there. And what we'll show, as the case moves  
10 forward, if we withstand this motion, is that that is because  
11 it is an emoluments magnet, because it is getting business from  
12 governments, particularly foreign governments, and that is  
13 driving their business. And they knew this. It's why they  
14 hired a director of diplomatic sales to pitch their business to  
15 embassies.

16 So it's not speculative. We have allegations already  
17 in the complaint.

18 THE COURT: Except that will not get you all the way  
19 there, because the question is not why are his profits higher.  
20 The question is, how do you define that as an injury to the  
21 plaintiff, that somehow it is a loss to the plaintiff. It is  
22 not evaluated by whether it's a greater profit to the  
23 President. It's evaluated by whether or not it has inflicted  
24 an injury upon plaintiff. And the injury that's been  
25 inflicted, I don't even know if the allegations are such that

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1 you say that the injury is clearly not exclusively because of  
2 foreign business. And I'm not even sure whether at this point  
3 you're even in a position to allege that it is primarily --  
4 because I'm not even sure you're relying on an actual loss of  
5 business with regard to any of these, as you say, your experts  
6 and what you want to extrapolate with regard to the  
7 competition, you want that to be a logical conclusion, that  
8 they're in direct competition so that should be good enough.  
9 That's good enough for part of the test, but that's not good  
10 enough for all of it.

11 MR. GUPTA: Right. It's not just a logical  
12 conclusion. We have empirical evidence. We've shown, there's  
13 un rebutted testimony that there is direct competition. And  
14 what those cases say, what the competitor standing cases say,  
15 is, where you are competitors in the relevant arena and there  
16 is an alleged illegal competitive benefit to the defendant,  
17 even if there might be other things -- there are always going  
18 to be other things going on in the market -- that's enough to  
19 get your foot in the door.

20 THE COURT: Well, but it's not other things going on  
21 in the market. It's the same thing that's going on in the  
22 market. It is that people, both foreign governments, U.S.  
23 government, and nongovernment patrons are being affected in the  
24 same way as you are.

25 MR. GUPTA: That's another argument the government is

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1 making, the idea that some people who are not governments who  
2 don't have particular reasons to curry favor with the President  
3 as governments, that they are going to the President's hotel  
4 and that defeats the chain of causation. That's not even  
5 something they've argued in their papers.

6 THE COURT: Well, you have argued injury. They have  
7 argued broader, that you cannot trace the injury to a violation  
8 of the emoluments clause.

9 MR. GUPTA: Right. They have alleged that. They have  
10 argued that. And I think, you know, what these cases show is,  
11 standing is not Mount Everest, right. We're at the pleading  
12 stage. We have done more at the pleading stage than I've seen  
13 in any of these other competitor standing cases, to show that  
14 there is direct relevant competition in this market for foreign  
15 and domestic government business. And as the case moves  
16 forward, the quantum of evidence is going to go up. And if  
17 there's time, I would like my colleague, Mr. Sellers, to  
18 explain how we intend to prove the case and show that these  
19 competitive events are actually being realized by the  
20 plaintiffs.

21 And so in the time I have left, let me briefly turn to  
22 the argument that the government made that you lack the power  
23 to issue any relief against the President.

24 Now, the government relies on this case *Mississippi v.*  
25 *Johnson*. It's a case from just after the civil war, where the

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1 state of Mississippi was suing the President and trying to  
2 restrain the President from acting as commander in chief and  
3 putting Mississippi under military government. And the Supreme  
4 Court said, in a case that has since been understood as a  
5 political question case, that we are not going to restrain the  
6 President in the exercise of his discretion as commander in  
7 chief and as executive in political functions.

8 Now, right after that case, they went back and they  
9 brought another lawsuit that the Supreme Court dismissed  
10 explicitly on political question doctrine grounds. So the  
11 argument they're making is that you don't have the power even  
12 to declare what the law is with respect to the President or  
13 issue an injunction.

14 And the problem for that is, there are actually plenty  
15 of cases where courts have issued both declaratory and  
16 injunctive relief against the President since *Mississippi v.*  
17 *Johnson*. You can find some of these cases in a *Law Review*  
18 article cited at page 56 of our brief, the Siegel article. I'm  
19 also going to site you a case, your Honor, that we neglected to  
20 site in our papers, because I think it's helpful. It's the  
21 *National Treasury Employees Union Case v. Nixon*, 492 F.2d 587.  
22 And that case says, it would elevate form over substance to say  
23 that there is some difference between enjoining the President  
24 and enjoining, say, the Attorney General or the Secretary of  
25 Defense, which, courts do that every day.

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1           So there are plenty of cases in which courts are  
2           issuing relief against the President. So that shows that the  
3           reading of *Mississippi v. Johnson* is wrong. And it's basically  
4           a political question case.

5           And the problem for the government is that they can't  
6           invoke the political question doctrine. And that's why they  
7           haven't done so.

8           THE COURT: Why does the political question doctrine  
9           not apply to the foreign emoluments clause? We have a  
10          situation where clearly the framers of the Constitution gave  
11          the initial power to determine what's an emolument and the  
12          choice of whether to consent to an emolument to Congress. And  
13          if the President had gone to Congress and said, this is an  
14          issue I'm concerned about, you may or may not think it's an  
15          emolument, but I would like your consent, why is that a legal  
16          question at this point, for the courts? Why isn't that an  
17          issue between two branches of government that doesn't lend  
18          itself to a strict legal analysis? Because, one, as you say,  
19          we have no defined definition from Congress as to what they  
20          think an emolument is. And they would have to determine that,  
21          whether they were satisfied with that. And then they would  
22          have to determine whether they were going to consent. And  
23          whether or not your clients were injured by that would become  
24          irrelevant. Your clients would not have a cause of action,  
25          regardless of how severely they were injured, if Congress

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1 decided that it wanted to consent.

2 MR. GUPTA: Right.

3 THE COURT: So how is this not an issue that should be  
4 addressed by the political question doctrine? And how is this  
5 an issue, when it is not a dispute presently between Congress  
6 and the President? And clearly the Constitution is written so  
7 that the Congress would make the determination whether or not  
8 they were going to consent or not consent to a foreign  
9 emolument. Why is that not the most appropriate application of  
10 the political question doctrine?

11 MR. GUPTA: That would completely turn the clause on  
12 its head. The clause sets a broad prophylactic anti-corruption  
13 rule, you may not accept emoluments. And then Congress in its  
14 discretion can decide to consent. But that's a different  
15 question.

16 THE COURT: No, I can't agree with that. That is not  
17 a strict anti-corruption rule. If it was a strict  
18 anti-corruption rule, then Congress wouldn't be able to consent  
19 to it. It is an area, just like when the government argues  
20 about whether or not you have to take the money or it has to be  
21 a bribe or it can't be -- that's not the issue. If that was  
22 the issue, that would be a clearly justiciable issue, of  
23 whether or not the President is violating the law by doing this  
24 and doesn't have any ability to do it. The President has an  
25 ability to do this. He has the ability to do this whether or

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1 not -- the Constitution doesn't say you weigh who's being hurt  
2 by it. It doesn't say that Congress has to weigh whether or  
3 not it is anti-competitive.

4 MR. GUPTA: That's right.

5 THE COURT: It says -- it doesn't give any reason at  
6 all -- that they have to consent.

7 MR. GUPTA: Exactly. Congress doesn't have to give  
8 any reason.

9 THE COURT: Congress can simply say, you asked if you  
10 could keep this. And we know what they intended originally.  
11 It wasn't just talking about emoluments, but with regard to  
12 emoluments, you know, Presidents and other government  
13 officials, ambassadors, they go places and they're given gifts,  
14 foreign governments. And there is a certain protocol. And  
15 sometimes it looks bad. Sometimes it is bad, you know.  
16 Sometimes it looks bad but it's really not indicative of  
17 criminal intent. But the framers of the Constitution said, you  
18 don't even have to analyze that, because we're going to say,  
19 look, we know there are circumstances that you may want to say,  
20 yes, the President or other government officials can keep these  
21 gifts or keep this compensation, and you make the judgment  
22 about that. That's not a legal question. That's for you to  
23 decide. If you want to consent to it -- as a matter of fact,  
24 I'm not sure there's anything in the Constitution or in law  
25 that would prevent Congress from consenting to the President

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1 taking an emolument even if they concluded that it was a bribe.  
2 There's nothing in the emoluments clause which says they can't  
3 do that. It says that they can consent. And they can exercise  
4 that consent the same way they can exercise any consent power  
5 that the Constitution gives them with regard to judges, cabinet  
6 members, declaring war, treaties. They can exercise this  
7 power. They have the authority to exercise this power. They  
8 can make this an issue between them and the President that has  
9 to be resolved by the third branch of government. They have  
10 not presently done so. Why is it appropriate, given the  
11 political question doctrine, why is it appropriate for the  
12 judiciary to have the President fight this out with  
13 individuals, as they say, in a street brawl, rather than  
14 letting the Constitutional provision decide whether or not, as  
15 they argue, whether or not they're concerned about this or not  
16 concerned about this, whether they should decide whether it is  
17 an emolument or isn't an emolument, whether they should decide  
18 whether they want to consent to it or not consent to it? Those  
19 are not legal questions. They have the authority to do that  
20 for any reason that they want. Why isn't that the most  
21 appropriate application or applicability of what we define as  
22 the political question doctrine?

23 MR. GUPTA: So the political question doctrine, it's  
24 not just an ad hoc test about, you know, does this seem  
25 political. Right. That's a test. And *Zivotofsky* gives us the



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1 most recent formulation of the test. You've got to ask, is  
2 there a textually demonstrable commitment to another branch.  
3 And I think what you're suggesting is, what you're asking is,  
4 does the consent-of-Congress clause represent such a textually  
5 demonstrable commitment.

6 THE COURT: In most cases the answer would be yes.

7 MR. GUPTA: No.

8 THE COURT: In most cases the answer would be no?

9 MR. GUPTA: Oh --

10 THE COURT: If it gives Congress the ability to  
11 consent?

12 MR. GUPTA: Well, actually, there are other clauses in  
13 the Constitution that we've cited where there is a consent-of-  
14 Congress exception but there is a default rule. Courts hold  
15 those rules to be justiciable.

16 And what this would do is turn the clause on its head.  
17 Rather than ban emoluments unless Congress has consented to  
18 them, the clause would permit emoluments unless Congress bans  
19 them. That would flip the script.

20 The other problem here is that what you don't have is  
21 a lack of judicially discoverable and manageable standards.

22 THE COURT: But that happens all the time. I mean, if  
23 the President -- there are a number of treaties that Presidents  
24 have signed that Congress has not approved, not acted upon. It  
25 may affect the enforceability of that treaty. It may affect

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1 the viability of that treaty. But it doesn't mean that  
2 somebody could sue the President because he signed the treaty.

3 MR. GUPTA: No, right. But we're not suing over  
4 whether Congress has consented or Congress's failure to consent  
5 and exercise its discretion in that way. The problem here, of  
6 course, is, the President hasn't told Congress what payments  
7 he's accepting and asked for consent. He can certainly do  
8 that.

9 THE COURT: If Congress had a concern about it, they  
10 certainly have the power to request that information, to hold  
11 hearings, to enact legislation, to pass a resolution. They  
12 have the power to act if they were concerned about acting. I  
13 can only assume that back in the early 1800s they had the same  
14 conversation, that Congress can act if they want. They are a  
15 coequal branch of government. They don't have to sit on their  
16 hands if they think there's a problem. They can do something  
17 about it. And sometimes they do, sometimes they don't.

18 The President can't declare war without the consent of  
19 Congress. We haven't declared war since World War II. Does  
20 that mean that somehow the President is violating the  
21 Constitution because the military actions the Presidents have  
22 taken over the last 70, 80 years, they didn't go to Congress  
23 and ask Congress to approve all this?

24 MR. GUPTA: No, of course not. But the fact that  
25 Congress has the ability to consent in its discretion and make

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1 exceptions to a broad rule doesn't mean that the rule is one  
2 that lacks judicially discoverable and manageable standards.

3 And the best place to look, maybe, for those  
4 judicially manageable and discovery standards is the  
5 significant body of precedent that has developed interpreting  
6 this clause. And you notice, in the government's argument,  
7 they didn't once mention their own department's body of  
8 precedent, the Office of Legal Counsel's precedent. We have an  
9 amicus brief from government ethics officials that shows,  
10 people in the government are constantly interpreting this  
11 clause, applying it. And so there is a body of judicially  
12 discoverable and manageable precedent that can be applied here.  
13 And our interpretation of the clause is fully consistent with  
14 that body of precedent. The problem for the government is  
15 that, given the facts of this case, they've got to run away  
16 from that interpretation.

17 And I thought your hotdog-stand hypothetical kind of  
18 illustrated this. I think what that hypothetical did is  
19 extracted a fairly major concession from the government that  
20 this clause does indeed extend to business transactions. And  
21 we know that because it has been extended that way in opinions.  
22 So, for example, there is a 1993 Office of Legal Counsel  
23 opinion that I recommend the Court take a look at, where you  
24 have partners in a law firm. The partners are getting  
25 distributions from the firm. They haven't personally done any

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1 services for a foreign government. They are simply getting  
2 profits that are coming from foreign governments. And that was  
3 sufficient to constitute a prohibited acceptance of an  
4 emolument under the emoluments clause.

5 We have also sent you, as a notice of supplemental  
6 authority, a very recent example where the emoluments clause  
7 was violated by the rental of rooms for the Consulate of Japan  
8 in Guam.

9 So there are ways to discover what this clause means,  
10 and it is, as you said, a broad prophylactic rule. And what  
11 the government has done, particularly in its reply brief, is  
12 retreat and come up with a contrived interpretation,  
13 inconsistent with its own precedent, to try to fit the facts of  
14 this case. And in the motion to dismiss, they suggested that  
15 the emoluments clause was about whether or not it's related to  
16 office. And we've showed you the problem with that  
17 understanding is, it's completely inconsistent with all the  
18 dictionary definitions, which, as you said, is much simpler.  
19 It just means profit gain or advantage.

20 And so we showed, in the opposition to the motion to  
21 dismiss, that actually we state a claim, under the emoluments  
22 clause, even under their interpretation. So they tightened the  
23 interpretation in the reply brief. Now they say there have  
24 also got to be personal services in exchange for the payment;  
25 the President has to do something. And so here's a

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1 hypothetical that I think illustrates, like your hotdog  
2 example, how extreme their position might be. If the merchant  
3 ambassador comes to the Oval Office with a check for \$100,000  
4 made out to The Trump Organization and says, this is for a  
5 block of rooms that we have rented at the Trump International  
6 Hotel. We consider this to be a fair market exchange. We're  
7 giving this to you because you're the President and we like  
8 you, and now let's sit down and discuss matters of state. In  
9 their view, that is not an emolument. Why? Because the  
10 President isn't performing any personal services in response to  
11 the check. But presumably if he went down to the Trump  
12 International Hotel and opened the doors and turned down the  
13 sheets personally, he would be receiving an emolument. That is  
14 an absurd reading of the clause.

15 THE COURT: I'm not even sure why that's necessarily a  
16 relevant discussion, because even the government concedes that  
17 if it was -- it wouldn't be an emolument, it would be a gift.  
18 And the emoluments clause prohibits both.

19 MR. GUPTA: It does.

20 THE COURT: So it doesn't make it any more or less  
21 prohibited. If it's a gift or an emolument, it's prohibited.  
22 Now, if you want to define it as something other than a gift or  
23 an emolument, then the emoluments clause, at least the foreign  
24 emoluments clause, wouldn't apply. But I'm not sure why that  
25 makes a distinction, to define it -- the argument can't be that

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1 it's not an emolument but it's a gift. It's got to be that  
2 it's not an emolument or a gift, in order for it not to violate  
3 the clause.

4 MR. GUPTA: I think something could be both.

5 THE COURT: It could be both.

6 MR. GUPTA: If I bribed you through -- if I pay you  
7 \$50,000 for a hotdog, is that a present or is that an  
8 emolument? Does it really matter? I think the point of the  
9 clause, of any kind, whatever language, is to sweep very  
10 broadly.

11 THE COURT: I would define that as an emolument.  
12 Because if you expect something for it, it is not a gift.

13 MR. GUPTA: Right. I think that's right. That's the  
14 common-sense understanding. I give you a gift, I'm not  
15 expecting anything in exchange for it. I give you an  
16 emolument -- but that's not a word we use -- but I give you an  
17 emolument, and I'm expecting something in exchange. That could  
18 include the fair market value for a good or service. And as  
19 your hotdog example shows, the \$50,000 hotdog shows, it's very  
20 hard to detect the difference between a bribe embedded in a  
21 commercial transaction and a totally honest commercial  
22 transaction. And that's exactly why we have this broad  
23 prophylactic rule.

24 THE COURT: Is there anything in your complaint that  
25 alleges that the President is accepting an emolument for

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1 another reason, other than he is doing a legitimate business  
2 transaction? I don't read anything in your complaint as  
3 accusing the President of doing anything other than engaging in  
4 a legitimate business transaction.

5 MR. GUPTA: Well, the whole point of this rule, the  
6 whole point of making it a broad prophylactic rule, is, it is  
7 very difficult to prove quid pro quo. That doesn't mean that  
8 we don't think that some of these payments raise the inference  
9 of quid pro quo. For example, the Chinese trademark sequence  
10 that's described in the complaint and the idea that these  
11 diplomats are saying, we're bringing business there, that  
12 suggests an inference, they think they're getting something for  
13 it. And the President has said -- this is at paragraph 96 of  
14 the complaint -- of Saudi Arabia, "I get along great with them.  
15 They buy apartments from me. They spend 40 million, 50  
16 million. Am I supposed to dislike them?" He says comments  
17 like this about countries that patronize his businesses. It at  
18 least raises an inference that they have sought to curry favor  
19 with the President and they have obtained favor from the  
20 President.

21 THE COURT: But is it your argument, as the Justice  
22 Department has articulated, that you believe that the  
23 President's simply engaging in a business transaction, that  
24 that in and of itself is a violation of the emoluments clause?

25 MR. GUPTA: The acceptance of profits or gain from

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1 foreign governments without the consent of Congress is a  
2 violation of the foreign emoluments clause.

3 THE COURT: That was a long answer to a yes-or-no  
4 question.

5 MR. GUPTA: No, it would be -- the answer is --

6 THE COURT: Is it your position that the President's  
7 being simply engaged in a business transaction while he is  
8 President is a violation of the emoluments clause? Yes or no.

9 MR. GUPTA: Yes, it certainly can be. The government  
10 just conceded that it can be. They conceded --

11 THE COURT: Well, not that it can be. Is it  
12 automatically a violation of the emoluments clause?

13 MR. GUPTA: If it includes the taking of profits or  
14 gains from a foreign government, yes, absolutely. That's what  
15 the clause is --

16 THE COURT: You give me an "if." I'm trying to get an  
17 affirmative answer from you. It's not with an "if." Is it  
18 your position that the President is prohibited from engaging in  
19 any business transaction, personally, in which he sells goods  
20 or services and gets paid market value for those goods or  
21 services, that that is prohibited by the emoluments clause?

22 MR. GUPTA: Yes. So long as he is accepting them from  
23 a foreign state. Yes. That's right.

24 And that's not just our view. That is the view -- I  
25 would recommend taking a careful look at the amicus brief by



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1 the government ethics lawyers. It's the consistent view of a  
2 body of -- I mean, I want to make it clear. This may be the  
3 first case in court involving alleged violations of the foreign  
4 emoluments clause. But it is not the first case in which  
5 careful lawyers have analyzed these clauses and say what they  
6 mean.

7 And that matters a lot in Constitutional  
8 interpretation. If there's a settled interbranch understanding  
9 that has developed, as we've shown in the two examples I cited,  
10 the 1993 OLC opinion, that example involving the rooms rented  
11 in Guam, this is not some new interpretation. The government's  
12 interpretation is a new interpretation.

13 And the problem for the government is, let's remember  
14 the purpose of the clause. How do they square their  
15 interpretation with the purpose of the clause? I think your  
16 exchange with my client --

17 THE COURT: That question is an important question for  
18 both of you. How do you square the purpose of the clause with  
19 the kind of lawsuit that you want to bring? That's a critical  
20 question for both of you, because both of you are in uncharted  
21 water with regard to that issue.

22 MR. GUPTA: Right. But when it comes to the merits,  
23 when it comes to how you interpret this clause, if you look at  
24 the OLC opinions, they are clear, every sing of one of them  
25 virtually is clear, the purpose of this clause was to have a

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1 broad prophylactic rule against corruption, against payments  
2 from foreign governments. And what you have from the  
3 government today, what's so different from all of the Justice  
4 Department's opinions about the clause, is a tortured rule that  
5 has been devised for this case, because they need to develop a  
6 rule that fits the facts, and suggest that there aren't any  
7 alleged violations. And the difficulty for them particularly  
8 is the violations surrounding the Trump International Hotel,  
9 where people are saying, we're patronizing these businesses  
10 because he's the President, we want to curry favor with him.  
11 Now, we don't have to prove all of that for a broad  
12 prophylactic rule, right? The rule is violated, is triggered  
13 when there are payments made by foreign governments where the  
14 President profits or gains. It's a simple rule. It doesn't  
15 have a scienter requirement. It's easy to administer. It's  
16 been administered across the federal government. And it's  
17 embodied in those Office of Legal Counsel opinions.

18 So for those reasons, we have stated a claim  
19 sufficient to withstand a motion to dismiss. You don't need  
20 to, in writing an opinion denying the motion to dismiss, you  
21 don't need to interpret all of the many hypotheticals that  
22 could come up. In any Constitutional provision, there are  
23 going to be difficult problems that could come up another day.  
24 As long as there is a sensible interpretation, consistent with  
25 all of the precedent, and we have stated a claim based on that

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1 interpretation, we should be allowed to proceed with the case.

2 And so unless you have further questions on the  
3 merits, your Honor, I would like to turn it over to my  
4 colleague, Mr. Sellers.

5 THE COURT: How much time do you want to spend,  
6 Mr. Sellers?

7 BACK TABLE ATTY: Five minutes or less.

8 THE COURT: OK. And, Mr. Shumate, do you want to  
9 respond after that or before that?

10 MR. SHUMATE: If I could respond now, I think that  
11 would be helpful. I'll try and be quick, your Honor.

12 First I would like, your Honor, to respond to this  
13 point about whether this is a political question or whether the  
14 Court should excise its equitable power. I think that's what  
15 the Court should focus on. Is this an appropriate case to  
16 exercise the Court's equitable power to enjoin the President of  
17 the United States?

18 They try to relegate *Mississippi v. Johnson* to an  
19 historical footnote. The Supreme Court, in *Franklin v.*  
20 *Massachusetts*, reaffirmed that ruling. It is still good law.  
21 If I may, I will quote from the court's opinion. "The District  
22 Court's grant of injunctive relief against the President  
23 himself is extraordinary, and should have raised judicial  
24 eyebrows. We have left open the question whether the President  
25 might be subject to a judicial injunction requiring the

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1 performance of a purely 'ministerial' duty. We have held that  
2 the President may be subject to a subpoena to provide  
3 information relevant to an ongoing criminal prosecution. But  
4 in general 'this court has no jurisdiction of a bill to enjoin  
5 the President in the performance of his official duties.'" And  
6 Justice Scalia concurs that an injunction, declaratory relief,  
7 doesn't matter, it's not appropriate against the President. So  
8 the question the Court should ask is, is this really an  
9 appropriate case, to enjoin a sitting President of the United  
10 States? We would respectfully submit that, yes, this is a  
11 question that should be resolved by the political branch, not a  
12 court sitting in equity.

13 If I could go to the question of competitor standing,  
14 we don't dispute all the existing case law. We don't dispute  
15 *Havens*. We don't dispute that the Second Circuit has  
16 recognized competitive standing in certain cases. But the  
17 question that is central to that analysis is whether the Court  
18 can infer a "certainly impending" competitive harm, loss of  
19 business. And they cannot reach that conclusion. It is  
20 entirely speculative, whether Ms. Phaneuf is going to receive  
21 lost commission.

22 I think it quite telling that they rely on her as  
23 their lead example of a competitor suffering harm, because she  
24 clearly is not, and they ask the Court to speculate about  
25 competitive harm.

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1 MR. SHUMATE: (Continued) If I can go to the question  
2 of proper interpretation of emoluments, your Honor, I think  
3 it's quite extraordinary that their position is that no federal  
4 officer can engage in private business. That is their  
5 position. If they are right, other presidents, other federal  
6 officers have engaged in prohibited transactions than the  
7 Emoluments Clauses. President Obama, we know he received  
8 royalties from the sale of books during his presidency. Did he  
9 violate the Emoluments Clause because he likely would have  
10 received royalties from the sale of the books to foreign  
11 government representatives? Did the Secretary of Commerce  
12 Penny Pritzger violate the Emoluments Clause merely because she  
13 held stock in the Hyatt Hotels during her time in office, and  
14 very likely there were foreign government customers that stayed  
15 at Hyatt Hotels during her tenure. For all of these absurd  
16 reasons, we respectfully submit that the proper interpretation  
17 of the word emolument is profit arising from office or employ.

18 I just wanted to correct the record on one thing I may  
19 have misspoke during my previous discussion. I think when I  
20 was talking about the absurdities from the plaintiff's  
21 interpretation, I may have said no federal official could  
22 receive income from Treasury bonds. I meant, the President. I  
23 was using a hypothetical applying Domestic Emoluments Clause.

24 One final thing, on your hypothetical involving the  
25 promise to take some official act, your Honor, I had some time

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1 to reflect on that. I think you will be pleased to know that  
2 you persuaded me to come around to your point of view, and the  
3 reason --

4 THE COURT: Neither pleased, nor unhappy.

5 MR. SHUMATE: The reason, your Honor, if I may, is  
6 because in that situation, the President would be taking some  
7 official act. A promise by the President would be something  
8 that the President would make in his official capacity, and I  
9 think that would be, in our view, an emolument if it was in  
10 exchange for something else.

11 Just to be clear, for purposes of this motion, we are  
12 assuming the President is subject to the Domestic Emoluments  
13 Clause. We have conceded that question, but it's not relevant  
14 to the resolution of the motion to dismiss.

15 Thank you, your Honor.

16 THE COURT: Thank you.

17 Mr. Sellers.

18 MR. SELLERS: Your Honor, I know the hour is late. I  
19 really want to just comment on a few things that might help the  
20 Court in anticipating, in the event it were to deny the motion  
21 to dismiss in any respect, what would lay ahead of us. And in  
22 some respects because of the Court's inquiries about remedies,  
23 I want to address the nature of the remedies we might be  
24 seeking in the event we are given that opportunity.

25 Let me begin with the proposition that we would intend

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1 to undertake a brief period of discovery if we were permitted  
2 to do so, after the Court were to rule, primarily focused on  
3 evidence of the violations of the Emoluments Clause as to which  
4 the commercial plaintiffs and CREW might have claimed that they  
5 have been injured, and keeping in mind that we are seeking both  
6 declaratory and potential injunctive relief, as the Court  
7 observed, the declaration that this conduct is unlawful is a  
8 very significant ruling that we would attach, we would regard  
9 as a substantial remedy for our clients, and indeed, if the  
10 Court were to so rule, we would hope that we could make some  
11 arrangements with the President in which he would in fact take  
12 appropriate steps to avoid the receipt of emoluments, illegal  
13 emoluments in the future, and may or may not require the need  
14 for injunctive relief.

15 In the event we were to seek injunctive relief, we  
16 would be proceeding on a well-trod path. This is certainly not  
17 the first time that a senior executive of the federal  
18 government has been called upon to have to take action to  
19 eliminate conflicts, and there are approaches including the  
20 segregation of profits and income from businesses. That would  
21 be one approach that could be taken to avoid receipt of  
22 emoluments.

23 Another, of course, which has been used even in this  
24 administration by senior executives nominated for cabinet  
25 positions, is divestiture. I want to assure the Court, because I

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1 think counsel for the government suggested perhaps otherwise,  
2 we in no way expect if that were to occur that this would  
3 require the Court's oversight over any period of time of the  
4 President's businesses. There are ways in which, of course, as  
5 long as the businesses are sufficiently opaque that we are not  
6 in a position to recommend particular steps that would be taken  
7 to achieve the divestiture, but we would expect there are ways,  
8 and indeed there are ways, in which using third parties and  
9 neutrals they can oversee the sale of assets and the placement  
10 of those proceeds in a truly blind trust that would eliminate  
11 the risk of ongoing conflicts.

12 So I would like to just assure the Court that if we  
13 were permitted to proceed, we would expect to undertake a  
14 period of perhaps at most, three, four, five months of  
15 discovery and ask the Court to consider a trial that might last  
16 about a week sometime as soon as its schedule would permit  
17 after that.

18 As the Court is aware, we have alleged not only  
19 violations of the Emoluments Clause in the past, but we contend  
20 that there continue to be ongoing violations of the Emoluments  
21 Clause, and as a result we believe that there is a sense of  
22 urgency about reaching the means by which to eliminate this  
23 conflict of interest if the Court were to permit us to proceed.

24 I'm happy to answer any questions, but I wanted to  
25 make sure the Court understood that.



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1 THE COURT: Thank you, sir.

2 Thank you very much, ladies and gentlemen. I am going  
3 to try to make sure that I can get you a decision within the  
4 next 30 to 60 days at the latest. I will try to move as  
5 quickly as possible.

6 This has been helpful. I want to get the transcript  
7 to review. Thank you very much.

8 (Adjourned)

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